Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-12

AIR EAST, INC., d/b/a ALLEGHENY COMMUTER, AIR EAST, INC., CHARLES ALLAN McKINNEY, JAMES AVERY TALLENT, JEFFREY H. WILKINSON and THOMAS REDDECLIFF,

Petitioners,

vs.

NATIONAL TRANSPORTATION SAFETY BOARD and ALEXANDER P. BUTTERFIELD, Administrator of the Federal Aviation Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Air East, Inc., d/b/a Allegheny Commuter, Air East, Inc., Charles Allan McKinney, James Avery Tallent, Jeffrey H. Wilkinson and Thomas Reddecliff respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 13, 1975.

Opinions Below

The opinion of the Court of Appeals, reported at 512 F. 2d 1227 (3d Cir. 1975), appears in Appendix B hereto. The opinion of the National Transportation Safety Board,

reported as NTSB Order No. EA-581, appears in Appendix C hereto. The opinion of Administrative Law Judge Fred L. Woodlock appears in Appendix D hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on March 13, 1975. A timely petition for rehearing *en banc* was denied on April 7, 1975. This petition for certiorari was filed within ninety days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the summary revocation of petitioners' aviation licenses without adequate statutory or regulatory guidelines and without a prior hearing is a violation of due process of law.

2. Whether the petitioners were denied due process on the review of the summary revocations of their aviation licenses

(a) by the failure to give adequate notice of the charges alleged;

(b) by the failure to dismiss stale charges;

(c) by the failure to dismiss charges not alleged to be in violation of any regulation or statute;

(d) by the Administrator's supplying the Board and the Law Judge with prejudicial material outside of the record;

(e) by the failure of the Law Judge and Board to make adequate findings of fact and conclusions of law and to specify the reasons therefor;

(f) by the failure of the Law Judge, Board and Court of Appeals to apply correct principles of law;

(g) by the failure of the Board to give the petitioners adequate time to prepare their appeal and by denying them oral argument;

(h) by the refusal of the Board and Court of Appeals to pass upon the constitutionality and application of various federal air regulations; and

(i) by applying the sanction of revocation when the petitioners did not violate any federal aviation regulation which provided for the penalty of revocation.

Statutes Involved

The statutory provisions involved are in Title 49, United States Code §§ 1429, 1485(a), which are printed in Appendix A hereto.

Statement of the Case

Prior to March 7, 1974, Air East, Inc., conducted scheduled air taxi passenger operations serving the Pennsylvania communities of Pittsburgh, Johnstown, Altoona and Harrisburg, and scheduled air mail operations serving Pittsburgh, Johnstown, Bradford, DuBois and Harrisburg. In connection with its air taxi operations, Air East was also an authorized aircraft repair station. The individual petitioners herein were pilots employed by Air East in connection with its flight operations, except for the petitioner Reddecliff, who was chief mechanic for the repair station.

Air East, Inc, was the holder of an Air Taxi Commercial Operator Certificate issued on August 21, 1969, and a Repair Station Certificate issued on August 21, 1970. Petitioners Charles Allan McKinney and Jeffrey H. Wilkinson were holders of commercial pilot certificates, while peti-

tioner James Avery Tallent was the holder of an airline transport pilot certificate. Petitioner Thomas Reddecliff was the holder of a mechanic's certificate with airframe and powerplant ratings. All of the aforesaid certificates were issued by the Federal Aviation Administration (hereinafter referred to as the FAA).

On or about January 18, 1974, the Administrator undertook a review of Air East's operations and, after interviewing various former employees and examining various records over a seven-week period, apparently concluded that Air East's operations as well as the piloting of its management personnel constituted an emergency to air commerce. At no time were petitioners requested to participate in the FAA investigation, advised of the charges against them, or asked for an explanation concerning the charges alleged against them.

On March 7, 1974, John J. Keyser, Assistant Chief Counsel of the FAA, purportedly acting on behalf of the Administrator of the FAA, issued emergency orders of revocation which immediately revoked all of the certificates above mentioned (R. I 1-27*). The alleged statutory authority cited for such orders was Sections 609 and 1005(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C.A. §§ 1429 and 1485(a) (reproduced in Appendix A). The petitioners appealed said orders to the National Transportation Safety Board (hereinafter referred to as the NTSB or the Board) on or about March 11, 1974, and the Administrator filed his complaints (exact duplicates of the emergency orders, R. I 37-42) on March 14, 1974. The cases were consolidated and assigned to NTSB Law Judge Fred L. Woodlock. A pre-trial conference was held

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* As used herein, "R. I 1-27" refers to the Record (R.) in the Court of Appeals, the volume thereof (I), and the pages therein (1-27) where the documentation is located. The Clerk of the Court of Appeals has been requested to transmit a certified copy of the record to this Court pursuant to Supreme Court Rule 21(1).

on March 20, 1974, at which time various orders relating to discovery were entered, including an order directing the Administrator to serve bills of particulars as to each charge because of lack of specificity in the complaints (R. II 356-361). Trial began on March 21, 1974.

On Friday, March 22, 1974, the Administrator gave to the Chairman of the NTSB, *ex parte* and outside the official records, certain defamatory material relating to the petitioners herein and impliedly criticizing certain discovery rulings made by the Law Judge that were adverse to the Administrator. A copy of this material was also given to the Law Judge and to petitioners' counsel at the close of the day's proceedings on March 22, 1974. On Monday, March 25, 1974, the petitioners moved to dismiss the charges based upon this improper and unethical approach by the Administrator to the Law Judge and the Board (R. I 248-258). The Law Judge denied said motion (R. VII 357-368).

On April 1, 1974, the Administrator requested and received the right to take an interlocutory appeal to the Board with respect to the Law Judge's ruling that the Administrator was limited in his evidence to those charges specified in the bills of particulars.

On April 5, 1974, petitioners moved to disqualify the entire NTSB from further participation herein (R. I 259-266), and on April 8, 1974, NTSB Chairman John H. Reed disqualified himself. The other Board members denied petitioners' motion for disqualification in Order EA-568 (R. II 376-382). On the same date, the Board denied the Administrator's interlocutory appeal and held that the Administrator was limited at the hearing to the introduction of evidence within the confines of the various bills of particulars (R. II 383-385). In spite of this ruling, the Law Judge continued to allow the Administrator's attorney to make proffers of other evidence for the record relating to acts not specifically charged.

The Administrator presented his evidence from March 22, 1974, to April 18, 1974. At the termination of the Administrator's case, the Law Judge dismissed Charges 11 and 18 of the Air East d/b/a Allegheny Commuter complaint (R. I 1-7) and Charge 4(g) of the Charles Allan McKinney complaint (R. I 8-12).

The petitioners proceeded with their case under protest (R. XV 3429-30). The trial ended on April 24, 1974, and the Law Judge issued his oral initial decision on April 26, 1974 (Appendix D). The Law Judge found against the petitioners on all charges except Charges 9 and 20 of the Air East d/b/a Allegheny Commuter complaint (R. I 1-7); Charge 4(g) of the Tallent complaint (R. I 13-17); Charge 3(f) of the Wilkinson complaint (R. I 18-21); and Charge 5 of the Air East Repair Station complaint (R. I 25-27). The Law Judge affirmed the Administrator's order of revocation in each case.

Petitioners appealed from said initial decision on April 28, 1974 (R. I 308). The Administrator also filed a Notice of Appeal on April 29, 1974 (R. I 310). On April 30, 1974, the petitioners moved to dismiss the Administrator's appeals on the ground that they had not been timely filed (R. I 313).

In accordance with Board rules, the petitioners filed their brief on appeal by mail on May 3, 1974, and on May 6, 1974 requested oral argument before the Board (R. I 324). On May 10, 1974, the Board adopted its opinion and Order EA-581 (issued on May 13, 1974) which denied petitioners' appeal, affirmed the initial decision of the Law Judge with one modification, and affirmed the Administrator's emergency orders revoking the petitioners' certificates. The one modification made by the Board was to dismiss Charge 4(h) of the Tallent complaint (Appendix C, fn. 116).

Petitioners' request for oral argument before the Board was denied by said order, and the issues raised by the

Administrator's appeal and petitioners' motion to dismiss said appeal were not reached.

The petitioners then filed timely appeals to the United States Court of Appeals, which affirmed the orders of revocation on March 13, 1975.

Reasons for Granting the Writ

The summary revocation of aviation licenses without prior hearing on the alleged grounds of "air safety" presents an important issue of federal law on which there are no statutory or regulatory guidelines, and the procedures followed in the review of such action are so lacking in due process that immediate clarification is needed by the Supreme Court to resolve conflicts between the Circuits and among the District Courts.

1. The summary revocation of the aviation licenses herein without adequate statutory or regulatory guidelines and without a prior hearing was a violation of due process.

The aviation certificates involved herein are licenses that are within that class of rights which are protected from arbitrary governmental action. *Bell* v. *Burson*, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board*, —— F. 2d —— (D.C. Cir. June 19, 1975, Docket No. 73-2169, slip opinion pp. 775-784). The due process clause of the United States Constitution requires a prior hearing before the revocation of such rights, "except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event." *Boddie* v. *Connecticut*, 401 U. S. 371, 378-379, 91 S. Ct. 780, 28 L. Ed. 113 (1971). However, as to such exceptions, this Court has stated:

> ". . . These situations, however, must be truly unusual. Only in a few limited situations has this

> Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the persons initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes* v. *Shevin,* 407 U. S. 67, 90-91, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

Section 609 of the Federal Aviation Act of 1958, as amended (49 U.S.C.A. §§ 1655(c)(1) and 1429), does authorize the Administrator to revoke any certificate issued by him upon a determination "that safety in air commerce or air transportation and the public interest requires" such action (Appendix A). If an appeal is taken from such action to the Board, the revocation is stayed unless the Administrator "advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order." 49 U.S.C.A. §§ 1429, 1485(a) (Appendix A).

The Administrator's procedural regulations relating to certificate action are contained in 14 C.F.R. Part 13. None of these regulations provides for participation by interested parties in the agency decision-making process. Once the FAA reaches a decision it advises the party of its proposed certificate action and the party then has certain options, the best of which is a request for an informal conference where safety violations are concerned. 14 C.F.R. § 13.19. However, if the FAA considers the situation an "emergency," there are no regulations or procedures permitting the certificate holder to present his side of the story before the Administrator or his designee revokes the certificate.

Besides the instant proceeding, summary action by the Administrator in the name of "air safety" has been before the courts three times in recent years, and in two cases the authority to revoke prior to a hearing was held to be an unconstitutional denial of due process and in the other case the Court side-stepped the issue by finding that there had been an opportunity, albeit informal, to present the certificate holder's position before the Administrator acted.

In *United States* v. *Harper,* 335 F. Supp. 904 (D. Mass. 1972), the Administrator sought a mandatory injunction requiring the defendant Harper to surrender his airman and medical certificates on the ground that there had been an emergency revocation of the same by the Administrator. The defendant challenged the Administrator's emergency order of revocation on the ground that he had not been given an opportunity to answer any charges and be heard as to why his certificates should not be revoked. Judge Wyzanski dismissed the Government's complaint, holding:

> "Insofar as 49 U.S.C. § 1429 purports to authorize a permanent revocation of a certificate without giving the holder an opportunity to be heard, that statutory section deprives the holder of due process of law guaranteed by the Fifth Amendment. The right of a person to be heard before he is deprived of his property by governmental action is the most elementary, fundamental, and comprehensive of the rights guaranteed by the due process clause of the Fifth Amendment. [Cases cited.] Such a guarantee may be validly limited only under the most compelling circumstances and then generally only for the briefest of periods. Here no such compelling circumstances exist." 335 F. Supp. at 906-907.

An appeal to this Court was vacated and the case remanded with directions to dismiss as moot. 406 U.S. 940 (1972).

In *Priority Air Dispatch, Inc.* v. *Brinegar,* not off. reported, 12 CCH Aviation Reporter 18,046 (D. D.C. 1973),

the plaintiff obtained a preliminary injunction when the Administrator revoked on an emergency basis plaintiff's FAA exemption for the carriage of hazardous materials because of alleged violations of the federal aviation regulations. In granting the preliminary injunction, the Court held:

> ". . . it appears that plaintiff is entitled to notice of charges and an adversary hearing prior to termination or revocation of its exemption . . ."

When the NTSB subsequently held that it lacked jurisdiction to review the Administrator's emergency revocation of P.A.D.'s exemption, the Court of Appeals reversed the Board and ordered it to proceed to a hearing on the revocation of both the exemption and the plaintiff's air taxi certificate. *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board,* —— F. 2d —— (D.C. Cir. June 19, 1975, Docket No. 73-2169, slip opinion pp. 775-784). In his concurring and dissenting opinion, Judge Danaher stated:

> "I am entirely satisfied that Priority was and is entitled, after notice of specific charges, to an evidentiary hearing before its operating authority shall be cancelled." (Slip opinion p. 784)

It would thus appear clear that the Court of Appeals for the District of Columbia has at least implicitly approved the decision by the District Court that an adjudicatory hearing based upon specific charges must be afforded to the operator before his exemption or certificate is revoked even when the Administrator proceeds to act on an emergency declaration based upon alleged air safety violations.

In *Aircrane, Inc.* v. *Butterfield,* 369 F. Supp. 598 (E.D. Pa. 1974), a three-judge federal District Court was called upon to decide the constitutionality of that portion of the Federal Aviation Act which allowed for the summary

seizure of an aircraft for an alleged violation of a safety regulation.[1] In a careful analysis of all the recent Supreme Court decisions relating to the need for a prior hearing before termination of rights, the Court concluded that the ultimate issue was "a balancing of the government's interest in summary action against the property owner's interest in adjudicating his rights prior to government action." 369 F. Supp. at 604. In undertaking its consideration of the various interests involved, the Court initially disposed of the Government's waving of the "air safety" flag by observing:

> "As a starting point, we believe that the dangers inherent in summary governmental action impel the courts to scrutinize closely governmental interests which supposedly justify such procedures. We do not believe that the sections which are challenged as unconstitutional should be upheld simply by referring to the overriding purpose of the Federal Aviation Act . . . The legitimate objectives of a statutory scheme as extensive as the FAA Act do not necessarily immunize from attack each and every section and regulation promulgated under it." 369 F. Supp. at 605.

The Court then proceeded to analyze the Government's interest in summary action and concluded that the federal air regulation upon which the alleged violation was based was related to air safety and that the FAA's actions were therefore prompted by a legitimate governmental concern for public safety.

As opposed to the Government's interest, the Court could find very little countervailing reasons why summary action would adversely affect the owner's interest. First, the Court found that the seizure of the aircraft would not significantly impair Aircrane's ability to ultimately vin-

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[1] Case Note, 40 J. Air Law & Com. 749 (1974).

dicate its rights because the aircraft, while an extremely valuable asset, would be returned to the owner upon the posting of a small bond, and therefore the owner was not unduly burdened in mounting a meaningful legal attack on the agency's action by the lack of its operating assets. Secondly, the Court found that prior to seizure the owner of the aircraft had the opportunity to advise the FAA in detail of its position with respect to the alleged violations. This pre-seizure discussion was held to satisfy the acknowledged principle that:

> ". . . One of the reasons due process ordinarily requires that adverse parties receive a full opportunity to present their respective positions is that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" 369 F. Supp. at 607.

Finally, the Court concluded that the limited inconvenience to the owner of the aircraft, i.e., the posting of a $1,000 bond, weighed in favor of upholding the statutory scheme.

Although the Court balanced the competing interests in favor of summary action by the Government, it was clearly disturbed by several factors:

> "Against these reasons for upholding the seizure provisions, we balance two considerations which, under the language of *Fuentes,* do cut somewhat in Owners' favor. First, there does not appear to be present here the type of emergency such as was posed by contaminated food in *North American Storage, supra,* and second, there is some question whether the seizure here took place under a sufficiently narrowly drawn statute to insure that summary action takes place only when 'necessary and justified.'" 369 F. Supp. at 608.

In its final analysis, the Court upheld the constitutionality of the summary seizure on a very narrow point:

> "We have based our decision to uphold this statutory scheme on the conclusion that the salient facts of the case justify viewing it as an exception to *Fuentes,* in which notice and hearing may be dispensed with. We note in passing, however, that even if the *Fuentes* principles applied, we are of the view that the extended exchange of communications between Owners and the FAA *before* the seizure might well have constituted sufficient notice and hearing to satisfy due process under the circumstances." 369 F. Supp. at 608-609.

Petitioners would distinguish *Aircrane* from their case on two very important points: First, unlike *Aircrane,* the petitioners herein were not given notice of the charges against them or offered an opportunity to rebut them prior to emergency revocation. Secondly, once revoked, the petitioners lost their means of livelihood and lacked the financial resources to present a meaningful defense during the Board proceedings. Cf. *Goldberg* v. *Kelly,* 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

In analyzing the present situation under the three criteria set forth in *Fuentes* (*supra,* pp. 7-8), petitioners concede the first criterion of *Fuentes,* i.e., that an important government or general public interested is involved in air safety.[2] Petitioners submit, however, that criteria two and three are lacking herein, i.e., the special need for very prompt action and the decision to revoke being necessary and justified and made by the responsible government official under the standards of a narrowly drawn statute.

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[2] Petitioners contend, however, that, as in *Aircrane,* the Court must examine each regulation to determine whether it is applicable and involves a matter of air safety that would warrant the summary action taken by the Government. The Court of Appeals did not undertake such a review (see pp. 37-38 *infra*).

One must immediately question where the "emergency" was in the present situation which justified the need for "very prompt action." The Administrator's investigation took seven weeks, and during this time Air East operated with a perfect safety record. Indeed, Air East in its three-year history had conducted some 36,000 flights with only one accident, the cause of which was not shown to be in any way related to the charges in the complaints (R. VI 245-7). Furthermore, the individual petitioners and the repair station had never been convicted of any prior safety violations. Where, then, was the "truly unusual" situation which justified revocation prior to hearing?

The decision by the Court of Appeals justifies the leisurely pace of the FAA's seven-week investigation by concluding that serious consideration was being given to the charges. This was certainly based upon good faith conjecture by the Court since there was no evidence in the record as to the reason for the prolonged investigation; but even if such a delay was based upon the FAA's "serious efforts . . . to establish the validity of the charges," it is difficult to conform such assiduousness with the general and unspecific charges eventually filed by the FAA in the revocation orders (see Appendix C, pp. A20-A43).

Furthermore, the Court of Appeals' decision overlooked the fact that in 1973 petitioner Air East was the subject of two normally scheduled FAA field investigations which resulted in favorable reports. Thus, in the one-year period prior to revocation, Air East received three extensive investigations by the FAA—two conducted by experts assigned to the FAA's System Worthiness Analysis Program (SWAP),[3] which found no significant deviations from pre-

[3] As to the value that the FAA places on its SWAP investigations, see *Administrator* v. *Robertson*, Docket No. 74-450, decided June 24, 1975, 43 Law Week 4833.

scribed rules and regulations (R. VII 602-621),[4] and a third investigation conducted by FAA lawyers, in a "somewhat covert" manner as acknowledged by the Third Circuit, who apparently concluded that the "public interest" required the revocation of all the certificates held by the petitioners, although these same lawyer/investigator/aviation experts were incapable of identifying in their revocation orders any date, time or place of a specific violation.

While it is true that Air East had its first and only accident on January 6, 1974, this accident was not shown to be related to or caused by any of the violations alleged in the complaint (R. XIII 2704).[5] It is therefore clear that, based on Air East's exemplary safety record, its prior inspections by FAA SWAP teams, and its acknowledged willingness to discuss problems with FAA inspectors, there was no emergency to justify summary revocation of the petitioners' certificates.

It is equally clear that the emergency revocations herein were not made under the standards of a narrowly drawn statute. Initially petitioners point out that the statute authorizes the Administrator to dispense with notice and hearing when he "is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce." 49 U.S.C.A. § 1485(a) (Appendix A). Insofar as the decision to revoke without a hearing can rest upon

[4] In addition, the Chief of the FAA's Pittsburgh General Aviation District Office (GADO) testified that Air East's management always displayed compliance disposition and was willing to sit down and work out problems with GADO inspectors (R. VIII 801).

[5] When Pan American World Airways had three disastrous crashes in the South Pacific within one year (Tahiti, July 23, 1973; Pago Pago, January 30, 1974; and Bali, April 22, 1974), the FAA did not revoke its operating certificate. Nor when DC-10 cargo doors came off in midair due to faulty design did the FAA ground the aircraft or revoke McDonnell Douglas production certificate. Obviously, safety decisions are made on an *ad hoc* basis, and consistently in favor of the "big guy."

"the opinion" of the Administrator as to such a vague term as "safety," petitioners contend that the "standards of a narrowly drawn statute" are nonexistent and the grant of such power is unconstitutional as violative of due process.[6] *Giaccio* v. *Pennsylvania,* 382 U. S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966); see *Grayned* v. *City of Rockford,* 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

The Court of Appeals agreed that the statute was broad, but concluded that such a vast discretionary grant of authority was necessary in order to carry out the purposes of the statute. But even if this grant of authority can be constitutionally justified (which petitioners do not concede), the failure of the Administrator to prescribe specific rules and regulations advising the aviation community and the public as to when and how it will be exercised cannot be constitutionally justified. *Environmental Defense Fund, Inc.* v. *Ruckelshaus,* 439 F. 2d 584, 597-598 (D.C. Cir. 1971); *Holmes* v. *New York City Housing Authority,* 398 F. 2d 262, 265 (2d Cir. 1968); *Hornsby* v. *Allen,* 326 F. 2d 605, 610 (5th Cir. 1964).

Indeed, as Mr. Chief Justice Burger once held:

> ". . . Such debarment cannot be left to administrative improvisation on a case-by-case basis. The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made." *Gonzalez* v. *Freeman,* 334 F. 2d 570, 578 (D.C. Cir. 1964).

[6] This Court has had occasion to criticize as being vague such statutory terms as "in the public interest." *Environmental Protection Agency* v. *Mink,* 410 U. S. 73, 79, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973).

And as Professor Davis has advocated in his treatise:

> ". . . *The Courts should develop a requirement that as far as practicable administrators must structure their discretionary power through appropriate safeguards and must confine and guide their discretionary power through standards, principles, and rules.* The requirement should extend also to undelegated power, including especially the extremely important power of selective enforcement." *Administrative Law Text,* page 52 (3d Ed. 1972).

Thus, whether one considers the statutory grant as too vague or the failure of the Administrator to establish standards and guidelines for the utilization of this statutory power, the conclusion is the same in either case: i.e., the lack of adequate standards, either statutory or regulatory, renders the emergency revocation prior to a hearing violative of due process.

The final criterion set forth in *Fuentes, supra,* is that summary revocation prior to hearing can only be justified if "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U. S. at 91.

The initial orders of revocation were issued over the signature of John J. Keyser, an Assistant Chief Counsel for the FAA (R. I 6, 11, 16, 21, 23, 26). After the petitioners appealed, Mr. Patrick G. Geraghty, Chief, Special Projects & Appellate Branch of the FAA, simply filed duplicate copies of the complaints and certified that an emergency existed (R. I 38, 41).[7]

[7] The chain of command within the FAA runs down from the Administrator to the Deputy Administrator to the Chief Counsel

(*footnote continued on following page*)

There is no doubt that the Administrator is authorized to delegate many of his statutory duties (49 U.S.C.A. § 1344(d)), and in fact the Assistant Chief Counsel was authorized by regulation to issue the initial orders of revocation. 14 C.F.R. § 13.19(b), as modified 38 Fed. Reg. 26,444 (1973). However, subdivision (d) of regulation § 13.19 specifically states that if the certificate holder files an appeal to the Board "the Administrator's order is stayed unless *he* advises the Board that an emergency exists . . ." (emphasis added). The "he" in the cited regulation clearly refers to the Administrator, and there is no other regulation which delegates the declaration of emergency certification to any subordinate. It was therefore improper for the Chief of the Special Projects & Appellate Branch of the FAA to certfiy the emergency to the Board and such conduct constituted the exercise of emergency power by an unauthorized government official.[8]

Faced with the foregoing constitutional difficulties, it appears that the Court of Appeals attempted to justify the due process deficiencies by remarking:

> "The petitioners were aware that an investigation was underway because they had been deposed and the company's records had been subpoenaed. To some extent, therefore, they had been given an opportunity to present explanatory material before the revocations occurred. There is no necessity, therefore, to consider under what circumstances an invitation to submit exculpatory material might be necessary before summary action by the Administrator." (Appendix B)

(*footnote continued from preceding page*)

to the Deputy Chief Counsel to Assistant Chief Counsel, which Mr. Keyser is one of many. Mr. Geraghty was one of numerous branch chiefs working for Mr. Keyser.

[8] Petitioners further contend that it was error for the Board to refuse to review the declaration of emergency certification (R. II 491). 49 U.S.C.A. 1429 contains no limit on the Board's power of review over the Administrator's actions, and, in fact, affirmatively the Administrator. This self-imposed rule of abstention by the Board further denies the petitioners procedural due process.

Clairvoyance has never been a substitute for the notice requirements of due process.[9] Indeed, in order to illustrate the type of notice given to the petitioners herein, the entire deposition of Mr. Reddecliff is printed in Appendix E. The subpoena served upon Air East was equally uninformative since it simply called for the production of *all* personal, operational and maintenance records. When the President of Air East responded to the subpoena, the notice received was as follows:

> "By Mr. Geraghty: Let the record show that we are convened at the Johnstown Cambria County Airport at 13:45 hours, 30, January, 1974, for the purpose of taking return of subpoenas issued to Mr. McKinney as President of Air East, Inc., which were issued pursuant to an order of investigation issued by the Administrator of the Federal Aviation Administration under authority delegated to him under the Federal Aviation Act of 1958, as amended. Such investigation being into the operating practices and procedures of Air East, Inc."

The deposition then went on to ask Mr. B. F. McKinney to identify the Air East records he was producing pursuant to subpoena.

The Court will note that the "notice" referred only to an investigation of Air East, and not the individual petitioners.

[9] In *Aircrane* v. *Butterfield*, 369 F. Supp. 598 (E.D. Pa. 1974), and *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board*, —— F. 2d —— (D.C. Cir. June 19, 1975, Docket No. 73-2169), the operator was given an opportunity to present its views in writing before revocation. Petitioners were not afforded this right, and the failure thereof again illustrates the arbitrary and *ad hoc* procedures followed by the Administrator.

At no time prior to revocation were any of the petitioners told what charges were being considered or given an opportunity to explain any of the alleged offenses uncovered by the FAA investigators.[10] Cf. *Blackwell College of Business* v. *Attorney General,* 454 F. 2d 928 (D.C. Cir. 1971). School children, parolees and prison inmates have more constitutional rights. *Goss* v. *Lopez,* —— U. S. ——, 43 Law Week 4181 (January 22, 1975); *Morrissey* v. *Brewer,* 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *Wolff* v. *McDonnell,* —— U. S. ——, 42 Law Week 5190, 5198 (June 26, 1974).

Petitioners would therefore submit that the summary revocation of their aviation licenses was a violation of due process of law and since no statutory or regulatory guidelines exist for the application of this summary power, the unconstitutional procedures occurring to petitioners are bound to recur. Review by this Court is a necessity.

2. The failure to grant the petitioners procedural due process with respect to their appeals from the summary revocations was contrary to constitutional and regulatory precedent.

The appeals herein were reviewed in such a desultory fashion by the Law Judge, Board and Court of Appeals that one can only conclude that procedural due process of law does not exist with respect to alleged air safety violations.

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[10] As Professor James O. Freedman states in his article *Summary Action by Administrative Agencies,* 40 Univ. of Chicago L. Rev. 1 (1972):

> "Requiring an administrative agency to inform an indidual that it is contemplating summary action against him, to describe the general nature of its information and the tenor of its reasoning, and to permit him a brief opportunity to discuss the matter with the agency's staff and advance arguments why summary action should not be taken could be most helpful in reducing the risk of error." (at 49)

A. The failure to make specific charges.

An examination of the complaints herein (App. C A20-A43) reveals that the Administrator revoked petitioners' certificates for allegedly violating federal air regulations, etc., "on numerous occasions." No dates, times, aircraft numbers, component parts, or other factual material are specified so that petitioners could identify the event.

Sections 421.4(d) and 421.23 of the Board's regulations require factual pleading (14 C.F.R.). Although the Law Judge ordered the Administrator to file bills of particulars giving factual details, these bills were equally defective and the petitioners moved to dismiss the complaints for lack of specificity.

In a classic statement which illustrates the prevailing approach at the Board to air safety enforcement proceedings, the Law Judge refused to grant the motion, stating:

> "I am bothered by it and I could, of course, strike the pleading and grant the respondents' [petitioners herein] motion. However, I am not going to do so, even though I think there is merit to the motion, because I think if we get into these technical matters, and I don't mean to discount the importance of technical matters, we will never get to trial on this thing." (R. VI 37)

The petitioners were therefore required to proceed to trial even though their motion had "merit." The due process requirement for notice of specific charges had become a mere "technicality."

It appears abundantly clear that the complaints herein fail to comply with Board rules relating to factual pleading. It is equally clear that the failure of a government agency to adhere to its own rules and regulations constitutes a denial of due process of law. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260, 266-268, 74 S. Ct. 499, 98 L. Ed. 681 (1954); *Service* v. *Dulles,* 354 U. S. 363, 388-389, 77 S. Ct. 1152, 11 L. Ed. 2d 1403 (1957); *Vitarelli* v. *Seaton,*

359 U. S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959); *United States* v. *Nixon*, 42 Law Week 5237, 5241 (July 24, 1974).

Of course, the lack of specificity and the failure to give adequate notice so that petitioners could properly prepare their defense were not only regulatory deficiencies, but also constitutional infirmities. As this Court stated in *Morgan* v. *United States*, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938):

> "The right to a hearing embraces not only the right to present evidence *but also a reasonable opportunity to know the claims of the opposing party and to meet them.*" (Emphasis added.) 304 U. S. at 18.

Accord, *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1967); *In re Oliver*, 333 U. S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948); *Armstrong* v. *Manzo*, 380 U. S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

The Board and the Court of Appeals attempted to justify the lack of specific allegations by stating that the complaints were amplified by the bills of particulars,[11] and the delivery of some twenty-one depositions to petitioners' counsel on the afternoon of the day prior to commencement of trial made petitioners "aware of the heart of the Administrator's case in advance of the hearing."[12]

But what the Board and the Court of Appeals ignored was the fact that the depositions were delivered the afternoon before trial commenced, and the bills of particulars were delivered the first day of trial and on subsequent days during trial. As this Court stated in *In re Gault*, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967):

> "*Notice*, to comply with due process requirements, *must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded*, and it must 'set forth the alleged misconduct with particularity.'" (Emphasis added.) 387 U. S. at 33.

"Timely notice of allegations and charges is an elemental aspect of due process." *Sarzen* v. *Gaughan*, 489 F. 2d 1076, 1084 (1st Cir. 1973). Accord, *Blackwell College of Business* v. *Attorney General*, 454 F. 2d 928 (D.C. Cir. 1971); Davis, *Administrative Law Text* § 8.02, page 197 (3d Ed. 1972).

The inherent unfairness of the instant procedure whereby the Administrator revoked petitioners' certificates on general allegations; waited until the first day of trial to give any specifics, which the Law Judge agreed were not very enlightening, and then forced the petitioners to proceed to trial while the Administrator prepared his case as he went along, was so alien to the concept of due process, fairness and justice that this Court should strongly condemn such procedures.

B. The failure to dismiss stale charges.

Section 421.25 (14 C.F.R.) of the Board's regulations provides for the dismissal of offenses occurring more than six months prior to the Administrator's orders of revocation. However, if the complaint alleges "lack of qualification," the Law Judge is to examine the allegations, and if they present an issue as to "lack of qualification," he may allow trial on these charges no matter how old they may be.

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[11] A defective indictment cannot be cured even by a good bill of particulars. *Russell* v. *United States*, 369 U. S. 749, 769-770, 82 S. Ct. 1083, 8 L. Ed. 2d 240 (1962); *United States* v. *Conyns*, 248 U. S. 349, 353, 39 S. Ct. 98, 63 L. Ed. 287 (1919). Furthermore, none of the "details" set forth in the bills (R. I 76-243) were proven at trial as evidenced by the Law Judge's complete failure to be specific. The bills as filed were deceptions.

[12] The depositions (save for two) were not a part of the record and therefore could not have been reviewed for content. Even the Law Judge questioned whether these depositions were subject to uniform interpretation (R. VI 59). (See Appendix E.)

Obviously, in proceeding under this section, the Law Judge has to first know the date of the offense so that he can determine whether the statute of limitations has run; but no dates were specified in the complaints. Secondly, the Law Judge has to decide whether the offense charged presents an issue of "lack of qualification." But what is "lack of qualification"? The term is not defined by the regulations, and is apparently subject to an *ad hoc* definition by each Law Judge who is faced with the issue. Cf. *Administrator* v. *Musso,* 30 C.A.B. 1610 (1960).

Since the Federal Aviation Act vests authority with the Administrator to set qualifications for the issuance of airman, air carrier and other aviation certificates (49 U.S.C.A. §§ 1422, 1424 and 1427), one would logically assume that lack of qualification refers to the certificate qualifications issued by the Administrator.[13] The petitioners, however, possessed all of the qualifications required by the regulations to obtain and hold their respective certifications. *None of the complaints recites any failure to adhere to the qualification requirements of the regulations.* How, then, do the petitioners lack qualification?

The FAA and the NTSB apparently work under the unstated theory that, if the Administrator alleges that you committed some unstated number of violations of some unstated regulations, you lack qualification. But cf. *Administrator* v. *Donoghue,* 1 N.T.S.B. 1568, 1569 fn. 7 (1972). Obviously, such an *ad hoc* interpretation of "lack of qualification", which deprives a certificate holder of the benefit of the statute of limitations, is constitutionally improper.

[13] The qualifications required for a mechanic's certificate are set forth in 14 C.F.R. Part 65, Subpart D; for a commercial pilot's certificate in 14 C.F.R. Part 61, Subpart D; for an airline transport pilot's certificate in 14 C.F.R. Part 61, Subpart E; for a repair station certificate in 14 C.F.R. Part 145, Subparts A and B, and for an air taxi certificate in 14 C.F.R. Part 135, Subpart A.

See *Grayned* v. *City of Rockford,* 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

As the Board advised the Administrator, as far back as 1966:

> ". . . if the Administrator desires to impose sanctions on airmen on the basis of a general duty to exercise 'the degree of care and responsibility required of a certificate holder,' the regulations could be amended to this effect." *Administrator* v. *Buchanan,* 45 C.A.B. 973, 974 (1966).

The regulations were never so amended, and unfortunately, in this case the Board ignored its own precedents, and the Court of Appeals ignored the entire issue.

C. Failure to dismiss charges not alleged to be in violation of any regulation or statute.

Charge 19 of the Air East complaint (R. I 5) charges Air East with intimidation of its pilots, but does not allege any regulatory or statutory provision which allegedly pertains to the offense. The Board has consistently held, except for this case, that no punitive action could be taken against a certificate holder unless there was a violation of a specific regulation. *Administrator* v. *Buchanan,* 45 C.A.B. 973 (1966); *Administrator* v. *Babbitt,* 1 N.T.S.B. 1305, 1307 (1971).

Furthermore, there were a number of charges alleged in the complaints accusing the petitioners of violating instrument approach procedures "approved" in Part 97 of the federal air regulations (R. I 2, pars. 5 and 6; R. I 9, pars. 4(a) and (b); R. I 14, pars. 4(a) and (b); R. I 18, pars. 3(a) and (b)). Of course, instrument approach procedures are not published in Part 97 or in the Federal Register and therefore they cannot be regulatory. *Andrews* v. *Knowlton,* 509 F. 2d 898, 905 (2d Cir. 1975), pet. for cert. filed March 26, 1975 (Docket No. 74-1217). But, in any event,

Part 97 (14 C.F.R.) deals only with "prescribed" procedures and not "approved" procedures. That this is more than a mere semantic difference is disclosed by FAA manual "Terminal Air Traffic Control," order 7110.8C published 1 January 1973 as amended. Note 4 to Section 1020 thereof provides:

> "A 'prescribed' instrument approach procedure is one published in FAR Part 97 and available for public use. An 'approved' instrument approach procedure is one issued to one or more operators for their use. It is not published in FAR Part 97, but is furnished to specific operators and the ATC facilities involved. 'Approved' instrument approaches are not restricted to use only by the operator's to whom issued; ATC is not responsible for determining if an operator/pilot requesting such approach has obtained necessary approval for its use."

Under the FAA's own definitions, an "approved" procedure is not regulatory, and therefore under the above-cited Board precedent it could not constitute a regulatory violation for which a sanction could be imposed. Here again, the Board ignored its own precedent, and the Court of Appeals ignored the entire issue.

D. The Administrator supplied the Board and the Law Judge with prejudicial material outside of the record.

At the close of the hearing on March 22, 1974, the attorney for the Administrator presented to the Law Judge a copy of a letter sent that day from the Administrator to NTSB Chairman John H. Reed. This letter contained certain prejudicial and defamatory remarks concerning the petitioners and also an implied criticism of the Law Judge's actions with respect to certain rulings he made as to the production of witness statements (R. I 248-258). The

receipt of this letter eventually caused Chairman Reed to disqualify himself from further proceedings herein (R. II 381-2). Petitioners' motion to dismiss the complaints herein because of the Administrator's actions was denied by the Law Judge (R. VII 357-370).

Since not one witness testified at the hearing as to any of the acts (economic coercion) mentioned in the material submitted by the Administrator, the presentation of this material in the manner indicated was improper, unethical and a blatant attempt to prejudice the rights of the petitioners herein. Indeed, the Law Judge did convict Air East on Charges 19 which related to alleged coercive acts.

Unfortunately, the Court of Appeals condoned this event with a footnote to the effect that it did not think that the material submitted was prejudicial. Cf. *Nadiak* v. *Civil Aeronautics Board,* 305 F. 2d 588, 594 (5th Cir. 1962). Of course, the Chairman of the NTSB thought it so improper (R. I 265-266) that he disqualified himself, and the Law Judge questioned the propriety of submitting such material to him (R. VII 366-368).

It is well acknowledged that Government misconduct is a proper basis upon which to dismiss indictments. *United States* v. *Russo,* Crim. No. 9373 (C.D. Cal. 1973); *United States* v. *Banks,* 16 Crim. L. Rep. 2090 (D. S.D. October 9, 1974); cf. *United States* v. *McCord,* —— F. 2d —— (D.C. Cir. Dec. 12, 1974), slip opinion pp. 22-28, 43 Law Week 2257; *Camero* v. *United States,* 375 F. 2d 777 (Ct. Cl. 1967). The only way that the effect of such prejudicial behavior and misconduct could have been removed from the proceedings herein was to dismiss the complaints and it was error not to have done so.

E. Inadequate findings of fact, conclusions and the reasons therefor.

Section 421.32(b) of the Board's regulations set forth certain requirements that shall be contained in the Law

Judge's initial decision. These requirements are:

> "The initial decision shall include a statement of findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact (including credibility of witnesses, where such finding is material), law, or discretion, presented on the record, and the appropriate sanction or denial thereof." 14 C.F.R. § 421.32(b).

Unfortunately, the findings herein do not meet the requirements of § 421.32(b). In fact, there are no findings as such—only a rambling summary of the testimony (Appendix D).

As Mr. Justice Brennan pointed out on a prior occasion, where findings are no more than a summary of the evidence, they are inadequate (*Delaware, L. & W. R. Co.* v. *City of Hoboken,* 10 N. J. 418, 427, 91 A. 2d 739, 743 (1952)), and the matter should have been remanded for specific findings, or the Board should have issued new findings pursuant to § 421.36 (14 C.F.R.). *Carey* v. *Civil Aeronautics Board,* 275 F. 2d 518 (1st Cir. 1960); *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 306 F. 2d 739 (D.C. Cir. 1962); *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. 2d 554 (D.C. Cir. 1938); *American Smelting & Refining Co.* v. *Federal Power Commission,* 494 F. 2d 925, 944-945 (D.C. Cir. 1974); 2 Davis, *Administrative Law Treatise,* Chapter 16 (1958, 1970 Supp.).

The Court of Appeals again gave this deficiency footnote treatment by remarking that it thought the Law Judge's decision to be "comprehensive and unusually well-detailed" (Appendix B). However, an examination of the findings herein has to leave one wondering if the term "finding of fact" has taken on a new meaning. For example, with respect to the complaint against petitioner Wilkinson, the Law Judge's findings with respect to

Charge 3(h) were: The charge is supported by the evidence and it is so found"; and with respect to Charge 3(i); "The evidence supports this charge and it is so found." How can these be findings of fact?

By pointing out the specific findings above, petitioners do not imply that they agree that the other findings are correct. Indeed, they contest all the findings as being inadequate because the "findings" only state what various people testified to, no specific acts or events are detailed, and are conclusory as opposed to factual.

In addition, the Law Judge made findings based upon non-existent testimony. For example, the Law Judge found that petitioner Tallent violated Charge 4(e) (Appendix D, p. A117) based upon the testimony of the witnesses Montague and Sayther, but neither one testified against Tallent on this subject. Likewise, petitioner McKinney was found to have violated Charge 4(a) based upon the testimony of Montague (Appendix D, p. A119), but an examination of the record reveals that Montague never testified against McKinney on this charge. Likewise, the Law Judge convicted petitioner Wilkinson of Charge 3(a) based upon the testimony of the witnesses Howell and Dunn (Appendix D, pp. A124-A125), yet the record reveals that these witnesses gave no testimony against Wilkinson on this charge. Petitioner's citation of similar defects in the evidence relating to Charge 8 of the Air East complaint were characterized by the Board as an attempt to "undermine" the testimony and evidence (Appendix C, p. A63).

Furthermore, findings that someone made an "illegal approach" or an "unauthorized approach" or utilized an "unauthorized procedure" are meaningless and do not adequately advise the reviewing court of the grounds for the administrative action. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, 94, 63 S. Ct. 454, 87 L. Ed. 626 (1943); *Commissioner* v. *Duberstein,* 363

U. S. 278, 292-293, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960); cf. *Schneiderman* v. *United States,* 320 U. S. 118, 129-131, 63 S. Ct. 1333, 87 L. Ed. 796 (1943); 5 U.S.C.A. § 557(c)(3)(a). This is a classic case which demands remand for adequate findings and the reasons therefor.

F. Failure to apply correct principles of law.

Although the findings herein are totally inadequate to advise the reviewing court if the agency applied the correct principles of law, several salient errors are disclosed which warrant reversal.

For example, the administrative agency failed to apply the proper standard in reviewing the testimony of the government witnesses. An examination of the Law Judge's opinion reveals that he cited and relied upon only that testimony by government witnesses which was adverse to petitioners. There is no mention of the instances where government witnesses contradicted each other or gave favorable testimony to the petitioners. That testimony was ignored by the Law Judge and the Board. Cf. *Administrator* v. *Bradway,* 45 C.A.B. 956, 968-969 (1966). This was error because the record as a whole must be considered—i.e., both the good and the bad. *Universal Camera Corp.* v. *N.L.R.B.*. 340 U. S. 474, 488 71 S. Ct. 456, 95 L. Ed. 456 (1950); 5 U.S.C.A. § 706; and when an administrative agency accepts *carte blanche* all of the adverse testimony of the government witnesses, ignores testimony favorable to petitioners given by said witnesses, and totally rejects all of petitioners' evidence, a reviewing court should not casually accept this as a simple choice of credibility. *N.L.R.B.* v. *Union Pacific Stages,* 99 F. 2d 153, 158 (9th Cir. 1938).

Furthermore, the administrative agency herein applied the wrong standard for reviewing the testimony by the government witnesses. The Law Judge refused to give any consideration to the fact that all of the Government's witnesses were testifying pursuant to a promise by the FAA that their cooperation would be taken into consideration with respect to their own violations.[14] With respect to this point, the Law Judge stated:

> "Much also was made of the fact that during the course of the various depositions which were obtained from witneses by the Administrator, each witness was told that he would not get immunity by testifying but his cooperation would be taken into consideration by the Administrator in determining any sanction imposed on him or any enforcement action taken against him, and that therefore each witness came in and exposed himself as having committed these various violations on the strength that he would be released from any obligation in connection with them.
>
> It is an interesting theory but not a very realistic one. It implies that the Federal Aviation Administration conspired with these various witnesses and encouraged them to falsify their testimony so that charges could be made against Air East and the other respondents.
>
> That is the only extension of such a defense I can reach and I find the argument without any merit whatsoever." (R. II 398)

While the Law Judge's innocence of the real world (apparently shared in by the Board) is refreshing, it is directly

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[14] At no time during the trial did the Administrator's attorney ever voluntarily disclose any information relating to the promises made to government witnesses for their cooperation. In *United States* v. *Mitchell,* 372 F. Supp. 1239, 1257 (S.D.N.Y. 1973), it was held that all "favors or deals" between the Government and its witnesses had to be disclosed upon the witness being called to testify. The lack of candor displayed by the Administrator herein is also reflected by his attorney's representation to the Court that no exculpatory material existed, when in fact there was such evidence (R. XII 2116-25). Cf. *Brady* v. *Maryland,* 373 U. S. 83, S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

contrary to all rules by which such testimony should be evaluated. Thus, in *Giglio* v. *United States,* 405 U. S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), this Court held that it was reversible error for the jury not to be made aware of and to consider in its deliberations on credibility the fact that a promise of leniency had been made to a key witness in return for his testimony. See *Napue* v. *Illinois,* 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *United States* v. *Murray,* 445 F. 2d 1171, 1176 (3d Cir. 1971).

The Third Circuit recognized the validity of petitioners' point but surmised "we have no doubt that this factor was properly evaluated [by the Law Judge] before the decision was announced" (Appendix B, p. A16). How the Third Circuit could make this pronouncement in light of the above-cited quotation by the Law Judge at the time he announced his decision is inexplicable.[15]

Finally, with respect to credibility, both the Law Judge and the Third Circuit pointed out that testimony of Air East's weather observer was totally unworthy of belief. In some magical fashion the brush that tarred this witness' testimony also tarred all testimony favorable to petitioners. What the Law Judge, the Board and the Third Circuit all overlooked or ignored was the fact that the weather observer was called by the Government as its witness. Since the Government called the weather observer to testify, the Administrator vouched for his credibility (*United States* v. *Jannsen,* 339 F. 2d 916, 919 (7th Cir. 1964)), and since the witness was never declared to be hostile (R. VI 276-8), it was improper for the Government to

[15] Likewise inexplicable is the statement by the Court of Appeals that "the only evidence presented in favor of the petitioners was their own testimony." This is false and can only reflect the fact that the Court of Appeals did not read the record. See, for example, R. VIII 969, 1026, 1048, 1065; IX 1322, 1328, 1335; X 1702.

impeach him. *Rothschild* v. *New York,* 388 F. Supp. 1346, 1349 (S.D.N.Y. 1975); *Shreve* v. *Hot Shoppes, Inc.,* 184 F. Supp. 436, 439 (D.D.C. 1960). Petitioners never called this witness to testify on their behalf.

It is obvious from the foregoing that erroneous standards were used throughout the proceedings below to judge credibility, and such an error is a denial of due process which requires reversal. As the Court of Appeals held in *Breeden* v. *Weinberger,* 493 F. 2d 1002 (4th Cir. 1974):

> ". . . administrative findings based on oral testimony are not sacrosanct, and if it appears that credibility determinations are based on improper or irrational criteria they cannot be sustained." (493 F. 2d at 1010.

Accord, *National Labor Relations Board* v. *Florida Citrus Canners Cooperative,* 311 F. 2d 541 (5th Cir. 1963); *Portable Electric Tools, Inc.* v. *National Labor Relations Board,* 309 F. 2d 423 (7th Cir. 1962).

The Court of Appeals also misapplied the applicable legal principles involved with respect to the review of administrative agency decisions. Cf. *Greater Boston TV* v. *F.C.C.,* 444 F. 2d 841, 850-853 (D.C. Cir. 1970). Although recognizing the substantial evidence test (49 U.S.C.A. § 1486(e)), the Court of Appeals stated:

> "If only a single witness had provided this type of evidence, there might be difficulty in determining whether it was sufficiently probative to sustain the burden of proof. However, the cumulative effect of the testimony of many witnesses who appeared and their complementary corroboration made it possible for the fact finder to decide the contested issues." (Appendix B)

Reduced to basics—the Court of Appeals was acknowledging that the evidence was "junk" testimony, but because

there was a great deal of junk, substantial evidence existed. Petitioners would submit that it is the "quality" of the evidence and not the "quantity" that must be considered in determining whether substantial evidence existed.

In addition to the previously mentioned erroneous principles of law, the Law Judge and the Board also found violations of certain regulations despite petitioners' claims that the procedures utilized had been approved by FAA officials. The Law Judge took the position that ". . . it is fairly well established that the government cannot be estopped to deny the authority of any employee to alter its practices" (Appendix D, p. A102). This is clearly not the law. *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 673-4, 93 S. Ct. 1804, 36 L. Ed. 2d 567 (1973); *Administrator* v. *Fabian,* 31 C.A.B. 1106 (1960). Review herein should clearly have considered the principle that no violation could be found where the procedure was specifically approved by FAA officials, especially when the Act vests authority in the Administrator (or his designee) to grant exemptions from any rule or regulations. 49 U.S.C.A. § 1348(e). The Court of Appeals ignored the issue.

Another erroneous principle applied below related to the alleged falsification of record. The Board had previously taken the position that any falsification would have to be of a material fact in order to constitute a regulatory violation. *Administrator* v. *Cochran,* 1 N.T.S.B. 136, 138 fn. 4 (1967). But one may search all of the opinions below for any finding that the alleged falsifications herein were of material facts. The opinions below are devoid of any such statement.

Many of the charges herein[16] related to the issue of whether or not Air East's management knew that one of

[16] See Charges 12, 13, 14 and 15 of the Air East complaint (R. I 3-4).

its employees was apparently forwarding some false check-ride forms to the Pittsburgh GADO. However, any activities of the employee as an FAA-designated check pilot were carried out in his role as an FAA inspector and not as an Air East employee (R. V 133-4; VIII 717-8). In fact, Mr. Fahey, Chief of the GADO office in Pittsburgh, acknowledged that when such checks are given the check pilot is carrying on an FAA function rather than a company function and that "He's working for us" (R. VIII 718).

In light of this testimony, petitioner Air East submits that when its employee was performing his FAA-designated duties he was a "borrowed servant" working for the United States Government. In *Denton* v. *Yazoo & Mississippi Valley Railroad Co.,* 248 U. S. 305, 52 S. Ct. 141, 76 L. Ed. 310 (1932), this Court heid that a railroad employee who was performing duties for the Post Office Department was a borrowed servant and the railroad was not responsible for his acts. As the Court stated the rule:

> "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former." 284 U. S. at 308.

Since no legal relationship existed between Air East and its employee when he was in a borrowed-servant status, Air East would not be responsible for his acts. The Board and the Third Circuit ignored this legal principle.

Based upon the foregoing, it is clear that incorrect legal standards were applied and correct legal principles were ignored by the Board and by the Court of Appeals. Findings based upon an erroneous application of the law cannot stand. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, 94, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

G. Failure to give adequate time to prepare an appeal and grant oral argument.

The Board's rules require an appeal to be taken within two days of the Law Judge's initial decision and a brief to be filed on appeal within five days thereafter. 14 C.F.R. § 421.41(a)(b). How is it physically possible with a transcript of some 4,000 pages and 150 exhibits containing several thousand pages to prepare an appellate brief in five or seven days? Again, this is a failure to provide a reasonable opportunity to be heard and constitutes a denial of due process of law.

Furthermore, the petitioners' request for oral argument before the Board on their appeal was denied on the basis "that the issues in this proceeding have been exhaustively litigated and, in our view, no useful purpose would be served by further argument". While petitioners recognize that there is no absolute right to oral argument, whether the failure to provide for it constitutes a denial of due process will depend upon the particular circumstances of each individual case. *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 275-277, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).

Due process required oral argument in the instant case because it is clear that the Board never had the opportunity to properly review the points raised by petitioners on their appeal herein. Petitioners mailed their brief from New York on Friday, May 3, 1974. The brief was not received by the Board until Monday, May 6, 1974. Yet, by May 10, 1974, the Board would have the reviewing court believe that it had fully reviewed petitioners' brief and the legal authorities cited therein; reviewed 4,000 pages of testimony and hundreds of exhibits to determine if the findings were supported by a preponderance of the reliable, probative and substantial evidence and prepared and/or reviewed the contents of its 57-page opinion and order.

Any federal appellate court knows that such a process is physically impossible; yet, this is the type of justice that suffices in the NTSB, where apparently the philosophy reigns supreme that so long as "air safety" is involved any abuse of individual rights will be tolerated. The time has come to call a halt to such abuses.

The official minutes of the NTSB reveal that the Board met on May 10, 1974, for a total of 55 minutes and that its discussions related to three separate items on the agenda. The only legal representative present was NTSB attorney Stuhldreher, who could hardly be expected to present petitioners' position since he apparently had already drafted the Board's adverse decision (R. II 457). Clearly, the only way that the Board could have become aware of petitioners' position herein was to grant oral argument, and the failure to do so constituted a denial of due process. *Londoner* v. *Denver,* 210 U. S. 373, 386, 28 S. Ct. 708, 52 L. Ed. 1103 (1908); *WIBC* v. *Federal Communications Commission,* 259 F. 2d 941 (D.C. Cir. 1958), cert. den. 358 U. S. 920, 79 S. Ct. 290, 3 L. Ed. 2d 239 (1958).

H. Refusal to pass upon the constitutionality and application of various federal air regulations.

Although the petitioners raised issues pertaining to the constitutionality and the application of various federal air regulations,[17] the Board refused to review this issue and the Court of Appeals ignored it.

The Board has consistently held in safety enforcement proceedings that it lacks jurisdiction to entertain attacks on the validity or reasonableness of regulations promulgated by the FAA Administrator. Appendix C, fn. 108;

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[17] The federal air regulations challenged as being unconstitutionally vague were 14 C.F.R. §§ 91.9, 91.29, 91.31 and Part 97 while those alleged to be inapplicable to the facts herein were 14 C.F.R. §§ 43.5, 43.9, 43.13, 43.15, 91.116, 91.117, 91.165, 135.43, 135.111 and 145.61.

Administrator v. *Roberts,* 1 N.T.S.B. 1627, 1628 (1972); *Administrator* v. *Lloyd,* 1 N.T.S.B. 1826, 1828 (1972). If the NTSB will not pass upon the constitutionality of the Administrator's regulations, then obviously the only recourse the petitioners have is the courts. But here the Court of Appeals ignored the entire issue.

While admittedly these regulations are technical in nature, only the courts remain to give any legal interpretation thereto and protect the rights of those who are prosecuted. *Pike* v. *Civil Aeronautics Board,* 303 F. 2d 353 (8th Cir. 1962); *United States* v. *Ozark Air Lines, Inc.,* 374 F. Supp. 234 (E.D. Mo. 1974), aff'd 506 F. 2d 526 (8th Cir. 1975). As the Court of Appeals for the Seventh Circuit ruled in *Bence* v. *Breier,* 501 F. 2d 1185 (7th Cir. 1974):

> ". . . we do not think it just to simply defer to a mere governmental assertion of impracticality respecting rules challenged for vagueness. Due process demands that each challenged rule be examined in its context to determine whether in fact further specificity would be feasible or practicable." 501 F. 2d at 1189 fn. 2.

The constitutionality and application of the challenged regulations should be judicially reviewed.

I. Revocation was not an authorized penalty.

Petitioners submit that their certificates could not be revoked because they had not violated any federal air regulation that provides for a penalty of revocation. The Court of Appeals affirmed the revocations on the theory that they "were within the scope of authority granted to the Board . . ."

We note initially that the Board is not given the power to revoke, but only to affirm, amend, modify or reverse the Administrator's initial decision to revoke. 49 U.S.C.A. § 1429. It is petitioners' contention that the initial decision

by the Administrator was improper since it was contrary to his published regulations.

There is no doubt that the statute gives the Administrator the power to revoke. 49 U.S.C.A. § 1429. However, the Administrator has published regulations that he will revoke if federal air regulations (14 C.F.R.) §§ 61.6, 61.20(b), 61.48, 65.18, 65.20 and 67.20 are violated. No other federal air regulations set forth revocation as a possible penalty.

Since the Administrator has given public notice as to the penalty of revocation for only certain specified violations, and the petitioners did not violate any of these regulations, it is clearly improper to permit an *ad hoc* revocation in this case. As the Fourth Circuit recently held *en banc* in *Cross* v. *United States,* 512 F. 2d 1212 (4th Cir. 1975):

> *"Due process on the issue of sanction requires that the punishment* follow rationally from the facts, *be authorized by the statute and regulations,* and aim toward fulfillment of the Act's purposes." (Emphasis added.) 512 F.2d at 1217-1218.

And as Mr. Chief Justice Burger found in another context:

> "In short, we construe, the pertinent statutory scheme as authorizing debarment but as not authorizing debarment without either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment of appellants." *Gonzalez* v. *Freeman,* 334 F. 2d 570, 580 (D.C. Cir. 1964).

Cf. *Pike* v. *Civil Aeronautics Board,* 303 F. 2d 353 (8th Cir. 1962); *Waters* v. *Peterson,* 495 F. 2d 91, 100-101 (D.C. Cir. 1973); *Bence* v. *Breier,* 501 F. 2d 1185 (7th Cir. 1974). Considering the totality of unfairness and lack of due process present throughout the entire proceedings herein, it was improper to revoke the petitioners' certificates. *Blackwell College of Business* v. *Attorney General,* 454 F. 2d 928 (D.C. Cir. 1971).

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-12

AIR EAST, INC., d/b/a ALLEGHENY COMMUTER, AIR EAST, INC., CHARLES ALLAN McKINNEY, JAMES AVERY TALLENT, JEFFREY H. WILKINSON and THOMAS REDDECLIFF,

Petitioners,

vs.

NATIONAL TRANSPORTATION SAFETY BOARD and ALEXANDER P. BUTTERFIELD, Administrator of the Federal Aviation Administration,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A.

Statutes Involved.

49 U.S.C.A.—

§ 1429. Reinspection or reexamination; amendment, suspension, or revocation of certificates; notification; hearing; appeal to Board; judicial review

The Administrator may, from time to time, reinspect any civil aircraft, aircraft, engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the

conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Administrator shall be made a party to such proceedings. Pub.L. 85-726, Title VI, § 609, Aug. 23, 1958, 72 Stat. 779.

§ 1485. Orders, notices, and service—Effective date of orders; emergency orders

(a) Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided,* That whenever the Administrator is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Administrator is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided fur-*

ther, That the Administrator shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter.

APPENDIX B.

Opinion of the Court of Appeals.

AIR EAST, INC., d/b/a Allegheny Commuter, et al., Petitioners,

v.

NATIONAL TRANSPORTATION SAFETY BOARD and Alexander P. Butterfield, Administrator of the Federal Aviation Administration, Respondents.

Nos. 74-1542 and 74-1914 to 74-1918.

United States Court of Appeals, Third Circuit.

Argued Feb. 7, 1975.

Decided March 13, 1975.

Walter E. Rutherford, Haight, Gardner, Poor & Havens, New York City, for petitioners.

Carla A. Hills, Asst. Atty. Gen., New York City, William Kanter, Anthony J. Steinmeyer, Morton Hollander, Appellate Section, Civ. Div., Dept. of Justice, Washington, D. C., for respondents.

Before ADAMS, ROSENN and WEIS, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

In legislating on air travel safety, Congress has recognized that the duty of air carriers is to perform their services "with the highest possible degree of safety in the public interest," 49 U.S.C. § 1421(b). With that standard as a backdrop, we consider these appeals from the revocations

of certification of an air taxi line, several of its pilots, and its chief mechanic. A review of the record establishes to our satisfaction that the action of the National Transportation Safety Board is supported by substantial evidence, and we affirm.

Air East is a commuter airline authorized to furnish passenger and mail delivery service to a number of communities in western and central Pennsylvania, including Pittsburgh, Johnstown, Altoona, Bradford, and DuBois. It was certified by the Federal Aviation Administration [F.A.A.] on August 29, 1969. Petitioners Charles Allan McKinney, James A. Tallent, and Jeffrey H. Wilkinson were senior pilots with Air East who held pilot's licenses issued by the F.A.A.[1] Additional petitioners are Air East (Repair Station), a separate corporation which operated an aircraft repair facility in Johnstown pursuant to a certificate issued on August 21, 1970, and Thomas Reddecliff, an F.A.A. certified mechanic who supervised the repair station operations.

Air East operated without mishap until the evening of January 6, 1974, when a flight originating in Pittsburgh crashed on its approach to the runway in Johnstown, killing twelve of the occupants. Although there had been prior anonymous complaints to the federal authorities about some of Air East's practices, the crash precipitated a general investigation[2] of the carrier's operation in addition to

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[1] Tallent held an Airline Transport Pilot certificate, and McKinney and Wilkinson had Commercial Pilot certificates.

[2] This probe was authorized by 49 U.S.C. § 1429(a), which empowers the Administrator of the F.A.A. to "reinspect" periodically any licensee's conduct and to "reexamine" any civil airman. The result of reinspection or reexamination, if "safety in air commerce or air transportation and the public interest requires," may be the "amending, modifying, suspending, or revoking" of any certificate issued by the F.A.A.

the inquiry specifically directed to the cause of the accident.[3] During the period from January 18 to March 4, 1974, the F.A.A. interviewed a number of witnesses, deposed twenty-five persons, including present and former Air East employees, and examined the company records of aircraft maintenance and pilots' operations. On March 7, 1974, the Administrator issued an "emergency" order revoking the air taxi certificate held by Air East d/b/a Allegheny Commuter, the repair station certificate, the pilot certificates of McKinney, Tallent, and Wilkinson, and the mechanic certificate of Reddecliff.[4]

Petitioners immediately filed an appeal, and on March 21, 1974, a hearing commenced before an administrative law judge of the National Transportation Safety Board [N.T.S.B.]. After twenty-five days of testimony and argument, on April 24, 1974 the administrative law judge issued his oral decision, sustaining the revocation. The Board affirmed in an opinion issued on May 10, 1974,[5] and petitioners appealed to this court. 49 U.S.C. § 1486.

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[3] 49 U.S.C. § 1441(a)(2)-(5) requires the Administrator to investigate accidents involving civil aircraft, report the facts of each, and take steps to remedy such incidents and prevent their recurrence.

[4] This action was taken pursuant to 49 U.S.C. § 1429 which permits immediate revocation in an emergency and provides that an appeal to the licensee shall not stay the Administrator's order when he advises the National Transportation Safety Board "that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order." The Board is then required to finally dispose of the appeal within sixty days.

[5] The administrative law judge upheld 15 of the 19 charges against Air East, 9 of 9 against McKinney, 7 of 8 against Tallent, 8 of the 9 against Wilkinson, and the 2 charges against Reddecliff, as well as 3 of the 4 charges against the repair station. The Board sustained the administrative law judge except for one of the charges against Tallent which it reversed.

Petitioners were charged with the improper operation of aircraft, including, *inter alia:*

1. allowing overloaded planes to take off;
2. permitting planes to fly without certain instruments being in proper working order;
3. permitting planes to fly after improper repairs;
4. flying below minimum approach altitudes;
5. using approaches to the airports at Johnstown and Altoona which were not approved by the F.A.A.;
6. deviating from assigned altitudes without permission; and
7. operating without current weather reports.

Derelictions in record keeping were also alleged, including failing to prepare accurate weight manifests and computations of centers of gravity before take-off; falsifying records concerning flight checks given to pilots; falsifying records designating the supervisory mechanic responsible for repair of aircraft; and failing to enter mechanical deficiencies in the log. It was also charged that there were instances in which aircraft were put into service after improper repairs.[6]

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[6] Other additional charges included:

Against Air East:

1. instituting company practices which:
   a. prohibited pilots from logging inoperable instruments and equipment;
   b. required flight personnel to report such deficiencies on separate pieces of paper or orally to maintenance personnel;
   c. prohibited maintenance personnel from entering repairs in the log until such repairs were completed;

(*footnote continued on following page*)

Appendix B.

Petitioners contend that:

1. the emergency revocation of the licenses without a prior hearing was a denial of due process;
2. the hearing which was granted denied due process;

(*footnote continued from preceding page*)

d. allowed the operation of unairworthy craft; and forcing employee compliance by coercion and intimidation.

2. scheduling pilots for excessive duty without adequate rest;
3. improperly maintaining pilot flight time records;
4. utilizing pilots as required flight crew when they had not received initial flight training;
5. authorizing pilots to fly who had not completed proper flight, instrument and route checks;
6. failing to provide equipment so that pilots engaged in IFR and multi-engine operations could properly maintain and demonstrate their ability to conduct such operations;
7. failing to deliver summary reports to the Administrator relevant to propeller feathering in flight;
8. preventing pilots from attaining proficiency in more advanced flying techniques.

Against McKinney, Tallent and Wilkinson:

1. failing to maintain minimum distances from clouds under VFR conditions;
2. continuously serving as pilots-in-command without current instrument checks;
3. accepting assignments in excess of the maximum allowable hours and without required amounts of rest.

Against McKinney and Wilkinson:

1. serving as pilots in aircraft and under conditions for which they had not been checked.

Against McKinney and Tallent:

1. operating unairworthy planes and continuing flights when they discovered the craft to be so.

Against Reddecliff:

1. performing inadequate repairs on aircraft and permitting their return to service in substandard condition.

Appendix B.

3. the charges were not supported by probative and substantial evidence; and
4. the sanctions were excessive.[7]

I.

The Emergency Revocation Did Not Violate Due Process

This investigation began on January 18, 1974, and during the following six weeks, F.A.A. officials interviewed present and former employees of Air East. Several potential witnesses were reluctant to have their roles made public, and they preferred that the investigators meet them privately at the witnesses' homes during nonbusiness hours. Some of the witnesses had experienced personal differences with the Air East management; some were hesitant to involve friends in the inquiry; several were themselves guilty of violations which might expose them to possible sanctions; and others, still employed by Air East, did not wish to incur the animosity of management. The preliminary investigation, therefore, was not open but was somewhat covert.

However, the F.A.A. did issue subpoenas to Air East for the production of records, and on February 19, 1974, an

[7] Petitioners also allege that, in the absence of a finding that safety in air commerce or air transportation is involved, there is a lack of jurisdiction to revoke under 49 U.S.C. § 1429. However, the Board in its decision stated:

> "Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's orders revoking the certificates of all six respondents."

There is evidence to support that finding and we will not disturb it.

investigator deposed Reddecliff in the presence of his attorney. While the petitioners did not know all that was transpiring, certainly they were aware that a much broader investigation was underway than that focusing solely on the accident of January 6, 1974.

Petitioners assert that the Administrator's decision to revoke the certificates on an emergency basis denied them the opportunity for a hearing before being deprived of their livelihood. Unquestionably, as a result of the loss of certification, Air East was put out of business, and the pilots could not pursue their customary occupations without their licenses.

But under 49 U.S.C. § 1429(a), emergency revocation has an effect limited in time to a period of sixty days. While no hearing is required before revocation, the statute provides that an appeal by the licensee must be decided within sixty days. If the hearing establishes that the Administrator's action was not justified, the licenses can be restored immediately. Thus, while the action is termed an "emergency revocation," it is for all intents and purposes a suspension for sixty days or less. We point this out, not to invoke a *de minimis* concept, but to demonstrate that the statutory procedure does afford a prompt adjudication after revocation.[8] We do decognize that the suspension of a business for sixty days or a forced unemployment for that period is a grave matter which should not be treated lightly.

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[8] Indeed, petitioners assert that they did not have sufficient time to prepare their defense and appeal to the Board. But, the expedited disposition mandated by the statute is for the benefit of the licensees, and they were free to waive it. Probably, for economic reasons, petitioners chose not to do so. While recognizing their difficulties, we are not persuaded that prejudice resulted or that a hearing at a later date would have produced a different result.

Due process is flexible and must be analyzed in the context of its application. What is reasonable in one situation where there is time to pursue a leisurely and reflective study of the circumstances may be impractical and dangerous to life itself in another situation. Here, the stakes were high indeed—a threat to the lives of passengers who entrusted themselves to an air carrier which they had every right to assume was in compliance with the strict regulations of a specialized government agency. Even though the loss of the privilege of operating aircraft, albeit temporary, is critical to those who are certified, that hardship is outweighed by the disaster that could befall the passengers.

When the balancing of the public interest in safety against a licensee's right to a hearing before revocation involves factors such as we have here, no extensive discussion of authority is necessary. We need only remark that in this instance we are not concerned with such relatively less critical problems as the desirability of the collection of a judgment by an individual against the holder of a driver's license,[9] or the possible difficulty of recoupment when a welfare payment is erroneously made.[10] Indeed, here the consequences of inaction may be even worse than where the seizure of misbranded food products before hearing has been sustained,[11] or where the justification for summary action was prevention of a bank's failure.[12] And surely, if the summary seizure of property to collect taxes

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[9] Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

[10] Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[11] Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950).

[12] Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947).

meets constitutional standards,[13] there can be no doubt of the result where the threat to life is real. *See also* Aircrane, Inc. v. Butterfield, 369 F.Supp. 598 (E.D.Pa.1974).

We do not mean to imply that an agency like the F.A.A. is to be given carte blanche to exercise its power arbitrarily and capriciously. If these were only minor violations of a bookkeeping or technical nature or more serious charges of dubious authenticity, obviously different considerations would apply. But here, the accusations went to grave wrongdoing which jeopardized public safety and were supported by statements of apparently knowledgeable individuals.

Petitioners complain that, since the Administrator took six weeks to collect evidence and review it before *ex parte* revocation, the lack of urgency was patent. But that argument cuts another way as well. It demonstrates that the revocations were not hasty or ill-considered and took place only after serious efforts had been made to establish the validity of the charges. Once the Administrator concluded that irreparable harm could result at any time, withdrawals of operating privileges were justified, if not demanded, by the public interest. The reality of the safety hazard was sufficiently established by the preliminary investigation to justify the emergency procedures utilized here.

The petitioners were aware that an investigation was underway because they had been deposed and the company's records had been subpoenaed. To some extent, therefore, they had been given an opportunity to present explanatory material before the revocations occurred. There is no necessity, therefore, to consider under what

[13] Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931).

circumstances an invitation to submit exculpatory material might be necessary before summary action by the Administrator.

The petitioners urge that the statute is unconstitutionally vague in authorizing the Administrator to dispense with a prior hearing when "he is of the opinion that an emergency requiring immediate action exists in respect to air safety in commerce," 49 U.S.C. § 1485(a). They assert that "safety" is too general a term or, at the least, that some appropriate regulations should have been drawn to delineate the Administrator's discretion. But, the congressional intent is clear from the language of the statute. The primary concern is that of public safety, and in order to carry out the purpose of the legislation, the scope of authority was necessarily couched in broad terms. To limit the exercise of this discretion would be to frustrate the ends to which the statute was directed.

II.

There Was Due Process at the Hearing

Petitioners assert that they were denied a fair hearing because of procedural irregularities which occurred during the course of the administrative process. They cite as an example the Board's regulations which require the production of "a concise and complete statement of the facts relied upon."[14] The record reveals, however, that the administrative law judge at a pre-hearing conference ordered the filing of a more specific statement by the Administrator. In response, the government submitted its so-called "Bill of Particulars" which, though

[14] 15 C.F.R. §§ 421.4(d), 421.23.

not completely satisfactory to the petitioners, set forth in greater detail the various acts claimed to support the individual charges. Additionally, the names of witnesses who were expected to testify as to each count were included. Moreover, the government was required to deliver to petitioners' counsel copies of the depositions secured during the investigation period. The administrative law judge's orders effected a more comprehensive disclosure of the government's case than is customary in the normal civil or criminal cases in the district court. A reading of the transcript reveals that the administrative law judge was conscious of the burden imposed upon the petitioners by the stringent time limitation and, accordingly, ordered the government to do all but write a script for the hearing.

The petitioners pressed strongly for specific dates and times for each of the violations cited by the Administrator. In some instances, this was not possible because the witnesses had no independent means of fixing the precise day or hour when some of the incidents occurred. Understandably, this posed difficulties for the petitioners who might have desired to produce such data as weather reports to discredit testimony with respect to flying conditions. Nevertheless, it appears that the witnesses did their best to pinpoint dates when possible and narrowed times to weeks or months when no other data were available.

If only a single witness had provided this type of evidence, there might be difficulty in determining whether it was sufficiently probative to sustain the burden of proof. However, the cumulative effect of the testimony of the many witnesses who appeared and their complementary corroboration made it possible for the fact finder to decide the contested issues. In this proceeding as in most instances where oral testimony is important, absolute pre-

cision, desirable though it may be, was simply not possible. The generalizations were not more prevalent and, in fact, less so than in other proceedings. Cella v. United States 208 F.2d 783 (7th Cir. 1953).

Other alleged deficiencies in the hearing process have also been urged upon us. We have examined them in the light of the record and find no prejudicial error.[15]

III.

There Was Substantial Evidence to Support the Findings of the Board

In reviewing an appeal from the Board, we are bound by its findings of fact if supported by substantial evidence. 49 U.S.C. § 1486(e). We will not abdicate our function by defining "substantial" as a scintilla, Doe v. Dept. of Transportation, 412 F.2d 674 (8th Cir. 1969), see Davis, Treatise on Administrative Law § 20.01, but nevertheless, we must rely on the ability of the hearing officer to make judgments on witnesses' credibility. In that spirit we have evaluated the record, a voluminous one, and find that the substantial evidence test has been more than satisfied. What the petitioners urge, in effect, is to reverse the hearing officers findings on the credibility of witnesses. We decline to do so.

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[15] Petitioners allege that (1) investigators destroyed their notes on interviews with witnesses (copies of the statements were produced); (2) the Administrator sent a letter to the Board containing allegedly prejudicial information (we do not find it so); (3) the findings of the administrative law judge did not comply with the regulations (we find the oral decision to be comprehensive and unusually well-detailed); and (4) oral argument before the Board should have been granted and the Board should have disqualified itself (we find no merit to these).

Although it is true that a few of the witnesses may have had personal differences with some of the petitioners, not all did. Some of the witnesses had reason to fear F.A.A. proceedings for their own violations occurring while in the employ of Air East, but the fact that any of them had been promised consideration by the agency is not, in and of itself, sufficient to discredit their testimony. The possibility of bias was repeatedly drawn to the attention of the administrative law judge by petitioners' able counsel, and we have no doubt that this factor was properly evaluated before the decision was announced.

The only evidence presented in favor of the petitioners was their own testimony, and obviously, that had to be evaluated in the light of self-interest—certainly, as potent an element in credibility judgments as those which the petitioners find applicable to the government witnesses.

It is not necessary to review the evidence in detail. Instead, we will cite only a few examples to illustrate the nature of the testimony which petitioners would have us reject. For example, the petitioners denied all violations of overloading the aircraft on scheduled flights; yet, seven pilots testified that they had been ordered by petitioners McKinney and Tallent to ignore the weight limits so that flight schedules could be met. One of the witnesses related an incident which took place on August 13, 1973, when, as the result of an improper load balance, the plane nearly fell on its tail as passengers boarded.

Five pilots testified that they were instructed by the company to use unauthorized approaches at Johnstown and Altoona and that they, along with petitioner pilots, sometimes did so. Similarly, ten pilots detailed the company policy of flying below F.A.A.-prescribed minimum descent altitudes while under instrument flight conditions.

Although petitioners deny such conduct, there is credible evidence to the contrary.

A telling example illustrating the difficulties of petitioners' case involved Air East's own weather observer. He testified that between the dates of May 22 and May 25, 1973, he was a patient in the hospital on self-care status.[16] Although he stated that he had prepared the weather and visibility reports at the airport during this period, the medical librarian from the hospital produced records indicating that the weather observer was actually in the hospital at those hours. The administrative law judge characterized this Air East employee as "a man who the evidence shows as worthy of absolutely no belief whatsoever."

Recitation of other instances described in the testimony would unduly lengthen this opinion. We think it sufficient to say that a careful review of the record reveals that the test prescribed for appellate review of administrative proceedings has been met.

IV.

The Sanctions Were Not Excessive

We need only summarily treat the petitioners' contention that the sanction of revocation was not appropriate. The evidence of numerous incidents in which the public safety was compromised justifies the substantial deprivations imposed. They were within the scope of the au-

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[16] Self-care patients were permitted to leave the hospital after hours only with their doctors' permission. In doing so, they were required to sign in and out, noting the times and dates.

thority granted to the Board and we find no error in the revocation orders.[17]

In summary, we find that the action of the National Transportation Safety Board was supported by substantial evidence and that the petitioners' procedural rights were not violated. Therefore, the decision of the Board will be affirmed.

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[17] There is a difference of opinion as to whether the enforcement provisions are intended to be remedial or punitive in nature. *See* Sabinske v. C.A.B., 346 F.2d 142 (5th Cir. 1965); Nadiak v. C.A.B., 305 F.2d 588 (5th Cir. 1962); Pangburn v. C.A.B., 311 F.2d 349 (1st Cir. 1962). That debate does not affect our decision here.

We have been advised that after one year petitioners may ask for reinstatement. We echo the caveat in Nadiak v. C.A.B., *supra*, that passing upon such an application is a matter entrusted to the discretion of the Administrator and that nothing we have said or have implied in this opinion is intended to apply in that context.

APPENDIX C.

Opinion of the National Transportation Safety Board.

SERVED: May 13, 1974

NTSB Order No. EA-581

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 10th day of May 1974

ALEXANDER P. BUTTERFIELD, Administrator, Federal Aviation Administrator, Complainant, vs. AIR EAST, INC., *et al.*, Respondents.	Dockets SE-2509, 2511, 2519, 2512, 2513, and 2522

OPINION AND ORDER

This proceeding involves emergency orders of revocation issued by the Administrator against the following certificates: The air taxi/commercial operator certificate of Air East, Inc., d/b/a Allegheny Commuter; the commercial pilot certifiate of Charles A. McKinney (Vice-President of Flight Operations for Air East); the airline transport pilot certificate of James A. Tallent (Chief Pilot

for Air East); the commercial pilot certificate of Jeffrey H. Wilkinson (Training Officer for Air East); the repair station certificate of Air East, Inc., and the mechanic certificate of Thomas Reddecliff (Chief of Maintenance for Air East). Following motions by both the Administrator and respondents, all six cases were consolidated for hearing before Administrative Law Judge Fred L. Woodlock. The hearing commenced on March 21, 1974, spanned 25 consecutive working days, and concluded with the final presentation of testimony and with oral argument on April 24, 1974. On April 26, 1974, Judge Woodlock issued an oral decision in which he affirmed all six orders of revocation but dismissed certain charges in the various complaints.[1]

With respect to Air East, d/b/a Allegheny Commuter, the law judge found that the following charges where established by the preponderance of evidence:

(2)[2] Air East, as a matter of policy on numerous occasions, operated, caused, or permitted to be operated, aircraft in operations under Part 135 of the Federal Aviation Regulations (FAR) when such aircraft either exceeded the maximum certificated takeoff weight and/or were outside the approved center of gravity limits, in violation of sections 91.9[3] and 91.31(a)[4] of the FAR and section 610(a)(4) and (5) of the Federal Aviation Act of 1958[5] (hereinafter referred to as the Act). (Tr. 3849-3861)

(3) Air East, when conducting the operations described in Paragraph (2), directed or permitted its flight personnel to insert false and fictitious computations on the required load manifests so that they falsely showed such aircraft did not exceed the approved maximum takeoff weight and/or that the loading fell within the center of gravity limits, in violation of section 135.43(c) of the FAR.[6] (Tr. 3861-3863)

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[1] An excerpt from the hearing transcript containing the initial decision is attached.

[2] The paragraph numbers herein correspond to the charge number as set forth in the complaint (or order). At the end of each charge is a reference to the transcript pages on which the law judge discussed the evidence supporting that particular charge.

[3] Section 91.9 reads as follows:

"§ 91.9 *Carless or reckless operation.*

(*footnote continued on following page*)

(*footnote continued from preceding page*)

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[4] Section 91.31(a) provides as follows:

"§91.31 *Civil aircraft operating limitations and marking requirements.*

(a) Each person operating a civil aircraft shall comply with the operating limitations for that aircraft prescribed by the certificating authority of the country of registry."

[5] Section 610(a)(4) and (5) of the Act provides as follows:

"§ 610. [72 Stat. 780, as amended by 84 Stat. 234, 49 U.S.C. 1430]

(a) It shall be unlawful—

• • • • • •

(4) For any person to operate as an air carrier without an air carrier operating certificate, or in violation of the terms of any such certificate;

(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Secretary of Transporation* under this title; . . . (* Footnote omitted.)

[6] Section 135.43(c) provides as follows:

"§ 135.43 *Recordkeeping requirements.*

• • • • • •

(*footnote continued on following page*)

(4) Air East, on numerous occasions, failed to prepare or cause to be prepared as required at takeoff time, and to retain, load manifests for operations involving the carriage of mail by aircraft under contract with the U.S. Postal Service, in violation of section 135.43(c) of the FAR.[7] (Tr. 3863-3864)

(5) Air East, on numerous occasions, knowingly encouraged or permitted or instructed and required its pilots, when conducting operations under Parts 91 and 135, to use instrument approach procedures at Johnstown—Cambria County and Martinsburg —Blair County (Altoona) Airports, which had not been approved by the Federal Aviation Administration (FAA) in FAR Part 97, in violation of sections 91.116(a)[8] and 91.9[9] of the FAR and section 610(a)(5) of the Act.[10] (Tr. 3864-3867)

(*footnote continued from preceding page*)

(c) For multiengine aircraft for which two pilots are required by this chapter for operations under VFR, each certificate holder shall prepare or cause to be prepared a load manifest containing the following information concerning the loading of the aircraft at takeoff time—

(1) The number of passengers;

(2) The total weight of the loaded aircraft;

(3) The maximum allowable takeoff weight for that flight;

(4) The center of gravity of the loaded aircraft; and

(5) The center of gravity limits for the loaded aircraft."

[7] *Id.*

[8] Section 91.116(a) provides as follows:

"§ 91.116 *Takeoff and landing under IFR: General.*

(a) *Instrument approaches to civil airports.* Unless otherwise authorized by the Administrator (including ATC), each person operating an aircraft shall, when an instrument letdown to an airport is necessary, use a standard instrument approach procedure prescribed for that airport in Part 97 of this chapter."

[9] See footnote 3, *supra.*

[10] See footnote 5, *supra.*

(6) Air East, on numerous occasions, knowingly encouraged or permitted or instructed and required its pilots, when conducting operations under Parts 91 and 135, to use altitudes and/or visibility minimums at the airports described in paragraph (5) which were below those prescribed in the FAA approved instrument approach procedure as described in FAR Part 97, in violation of sections 91.117(a) and (b)[11] and 91.9[12] of the FAR and section 610(a)(5) of the Act.[13] (Tr. 3867-3873)

(7) Air East operated or caused or permitted to be operated under Part 135 numerous flight operations into and out of the Johnstown—Cambria Airport in weather conditions less than the VFR (visual flight rules) minimums when the Johnstown Flight Service Station (FSS) was not in operation and without the pilots being given weather reports from an accredited weather ob-

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[11] Section 91.117(a) and (b) provides as follows:

"§ 91.117 *Limitations on use of instument approach procedures (other than Category II).*

(a) *General.* Unless otherwise authorized by the Administrator, each person operating an aircraft using an instrument approach procedure prescribed in Part 97 of this chapter shall comply with the requirements of this section. This section does not apply to the use of Category II approach procedures.

(b) *Descent below MDA or DH.* No person may operate an aircraft below the prescribed minimum descent altitude or continue an approach below the decision height unless—

(1) The aircraft is in a position from which a normal approach to the runway of intended landing can be made; and

(2) The approach threshold of that runway, or approach lights or other markings identifiable with the approach end of that runway, are clearly visible to the pilot."

[12] See footnote 3, *supra.*

[13] See footnote 5, *supra.*

server, in violation of section 135.65,[14] 135.111, (a)[15] and 91.116(c)[16] of the FAR and section 610(a)(5) of the Act.[17] (Tr. 3874-3879)

(8) Air East initiated, adopted, or permitted the use of company policies, practices, or procedures which:

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[14] Section 135.65 provides as follows:

"§ 135.65 *Weather reports and forecasts.*

Whenever a person operating an aircraft in operations to which this part applies is required to use a weather report or forecast, he shall use that of the U.S. National Weather Service or an accredited observer. However, in the case of operations under VFR, the pilot in command may, if such a report or forecast is not available, use weather information based on his own observations or on those of other persons able to supply appropriate observations."

[15] Section 135.111(a) provides as follows:

"§ 135.111 *IFR: Takeoff, approach, and landing minimums.*

(a) No pilot may begin an instrument approach procedure if the latest weather report indicates the weather conditions at that airport are below its authorized IFR landing minimums."

[16] Section 91.116(c) provides as follows:

"§ 91.116 *Takeoff and landing under IFR: General.*

• • • • • •

(c) *Civil airport takeoff minimums.* Unless otherwise authorized by the Administrator, no person operating an aircraft under Part 121, 123, 129, or 135 of this chapter may take off from a civil airport under IFR unless weather conditions are at or above the weather minimums for IFR takeoff prescribed for that airport in Part 97 of this chapter. If takeoff minimums are not prescribed in Part 97 of this chapter, for a particular airport, the following minimums apply to takeoffs under IFR for aircraft operating under those parts:

(1) Aircraft having two engines or less: 1 statute mile visibility.

(2) Aircraft having more than two engines: One-half statute mile visibility."

• • • • • •

[17] See footnote 5, *supra*.

(a) Prohibited its pilots from logging inoperative or malfunctioning aircraft instruments, engines, or equipment in the appropriate spaces in the aircraft flight log; (Tr. 3879-3880)

(b) Contrary to the Air East company manual, required its flight personnel to report such malfunctions as described in subparagraph (a) above on a separate sheet of paper or orally to maintenance personnel. (Tr. 3880-3882)

(c) Prohibited its maintenance personnel from entering such flight personnel reported discrepancies in the flight log until such time as the required parts or repairs could be accomplished (Tr. 3882-3885)

(d) Permitted, required, or caused the falsification of aircraft maintenance records required to be maintained by Air East. (Tr. 3885-3886)

(e) Permitted, required, or caused the return to service for operations under Part 135 aircraft which had not had required airworthiness inspections and/or maintenance required by the FAR. (Tr. 3886-3887)

(f) Permitted, required, caused, or allowed operation of aircraft under Part 135 when required instruments and/or equipment were inoperable. (Tr. 3887-3889)

(g) Permitted, required, caused, or allowed the operation of aircraft when such aircraft were not in an airworthy condition. (Tr. 3889-3892)

By reason of the actions described in paragraph 8, Air East repeatedly violated sections 91.9,[18]

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[18] See footnote 3, *supra*.

91.29(a),[19] 91.165,[20] 135.60(g),[21] and 135.143(a) and (b)[22] of the FAR and sections 610(a)(1)[23] (4)[24] and (5)[25] of the Act.

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[19] Section 91.29(a) provides as follows:

"§ 91.29 *Civil aircraft airworthiness.*

(a) No person may operate a civil aircraft unless it is in an airworthy condition."

[20] Section 91.165 provides as follows:

"§ 91.165 *Maintenance required.*

Each owner or operator of an aircraft shall have that aircraft inspected as prescribed in Subpart D or § 91.169 of this part, as appropriate, and § 91.170 of this part and shall, between required inspections, have defects repaired as prescribed in Part 43 of this chapter. In addition, he shall ensure that maintenance personnel make appropriate entries in the aircraft and maintenance records indicating the aircraft has been released to service."

[21] Section 135.60(g) provides a sfollows:

"§ 135.60 *Approved aircraft inspection program.*

• • • • • •

(g) Each certificate holder who has an approved aircraft inspection program shall have each aircraft that is subject to the program inspected in accordance with the program."

[22] Section 135.143(a) and (b) provides as follows:

"§ 135.143 *General requirements.*

(a) No person may operate an aircraft in operations to which this part applies unless that aircraft and its equipment meet the requirements of applicable regulations.

(b) No person may operate an aircraft in operations to which this part applies, unless the required instruments and equipment in it have been approved and are in operable condition"

[23] Section 610(a)(1) of the Act provides as follows:

"SEC. 610 [72 Stat. 780, as amended by 84 Stat. 234, 49 U.S.C. 1430]

(a) It shall be unlawful—

(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate; . . ."

[24] See footnote 5 *supra*.

[25] *Id.*

(10) Air East maintained its pilot flight time records in accordance with the maintenance "Time in Service" definition (wheels-off to wheels-on) rather than pilot flight time (block-to-block). As a result thereof, Air East failed to keep the flight time records for all of its pilots in sufficient detail to determine compliance with flight time limitations, in violation of section 135.43(a)(4)(vii) of the FAR[26] and section 610(a)(5) of the Act.[27] (Tr. 3893-3895)

(12) From April 12, 1973 to date, Air East knowingly utilized the services of at least one pilot as pilot-in-command in Part 135 operations when such pilot or pilots had not completed the routes and airports flight check given by the Administrator or an approved check pilot, in violation of section 135.122(a) of the FAR[28] and section 610 of the Act. (Tr. 3895-3896)

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[26] Section 135.43(a)(4)(vii) provides as follows :

"§ 135.43 *Recordkeeping requirements.*

(a) Each certificate holder shall keep at his principal business office and make available for inspection by the Administrator the following:

• • • • • •

(4) An individual record of each pilot used by him in operations subject to this part, including the following information:

• • • • • •

(vii) The pilot's flight time in sufficient detail to determine compliance with the flight time limitations of this part."

[27] See footnote 5, *supra*.

[28] Section 135.122(a) provides as follows:

"§ 135.122 *Pilot-in-command qualifications: Routes and airports.*

(a) The certificate holder may not utilize a pilot, nor may any person serve as pilot in command of a flight under IFR unless, since the beginning of the 12th calendar month before that service

(*footnote continued on following page*)

(13) From April 29, 1973 to date, Air East knowingly and continuously used the services of at least one pilot in a Beechcraft Model 99 aircraft when he had not passed a flight check in that type aircraft given by the Administrator or an authorized check pilot in that type aircraft since the beginning of the 12th calendar month before that service, in violation of section 135.138(b) of the FAR[29] and section 610(a)(2)[30] and (5)[30a] of the Act. (Tr. 3896-3899)

(*footnote continued from preceding page*)

he has passed a flight check in one of the types of airplanes that he is to fly, given by an approved check pilot who is qualified in the aircraft, or by the Administrator, consisting of at least one flight over a representative airway or approved off-airway route, or portion thereof, over which he may be assigned to fly."

[29] Section 135.138(b) provides as follows:

"§ 135.138 *Initial and recurrent pilot testing requirements.*

• • • • • •

(b) No certificate holder may use the services of a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, he has passed a flight check given to him by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine, or turbojet, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft, including at least the maneuvers that are set forth in § 61.117 (b)(2), except (iii) (f); § 61.117(b)(3), except (i), (ii) (iii), (v), and (vi); § 61.117(s); § 61.121(b(1) and (2); § 61.121(c)(2) and (3) of this chapter, and related advisory circulars for pilot certification in the class of aircraft the pilot is to operate. However, a pilot who holds an instrument rating need not demonstrate the instrument flight maneuvers in § 61.117(c)."

[30] Section 610(a)(2) of the Act provides as follows:

"SEC. 610. [72 Stat. 780, as amended by 84 Stat. 234, 49 U.S.C. 1430] (a) It shall be unlawful—

• • • • • •

(*footnote continued on following page*)

(14) From April 30, 1973, to date, Air East knowingly and continuously used the services of at least one pilot-in-command under IFR (instrument flight rules) when he had not passed an instrument check given by the Administrator or an approved check pilot, in violation of section 135.131(a) and (b) of the FAR[31] and section 610(a)(5) of the Act.[32] (3899-3900)

(15) Air East knowingly falsified, or caused or permitted the falsification of, numerous pilot training records to show that flight crewmembers who had not been trained or tested were trained or tested and thereby failed to make available the true and

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(*footnote continued from preceding page*)

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any order, rule, or regulation issued under this title; . . ."

[30a] See footnote 5, *supra.*

[31] Section 135.131(a) and (b) provides as follows:

"§ 135.131 *Pilot in command: Instrument check requirements.*

(a) No certificate holder may use a pilot, nor may any person serve as a pilot in command of an aircraft under IFR unless, since the beginning of the sixth calendar month before that use, he has passed an instrument check and the Administrator or an authorized check pilot has so certified in a letter of competency.

(b) No pilot may use any type of instrument approach procedure under IFR unless, since the beginning of the sixth calendar month before that use, he has successfully demonstrated that procedure and the Administrator or an authorized check pilot has so certified in a letter of competency."

[32] See footnote 5, *supra.*

correct information, in violation of sections 135.43(a)(4)(vi) and (x) of the FAR.[33] (Tr. 3900).

(16) Air East, by reason of its actions as described in paragraphs (12), (13) and (14), failed to provide aircraft and facilities to enable its pilots, who were engaged in IFR and multiengine operations, to maintain and demonstrate properly their ability to conduct such operations, in violation of section 135.37 of the FAR.[34] (Tr. 3901)

(17) Air East, on at least one occasion, failed to mail or deliver to the appropriate representative of the Administrator a summary report concerning at least one of its multiengine aircraft, reporting the required information relating to propeller feathering in flight, in violation of section 135.59(b) of the FAR.[35]

(19) Air East, through its officials, put into effect and accomplished the company policies, practices, and procedures described hereinabove by intimidating, coercing, or threatening its pilots and maintenance personnel who refused, or were reluctant, to comply with such unapproved, illegal, or unsafe policies, practices, or procedures. (Tr. 3904-3907)

The law judge dismissed the following charges included in the Administrator's complaint against Air East:

(9) Air East, on numerous occasions, scheduled pilots for duty in excess of the maximum allowable 14 hours in any 24 consecutive hours and/or without the required 10 hours of continuous rest in any 24-hour period, in violation of section 135.136(b) and (f) of the FAR[36] and section 610(a)(5) of the Act.[37] (See Tr. 3892-3).

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[33] Section 135.43(a)(4)(vi) and (x) reads as follows:

"§ 135.43 *Record keeping requirements.*

(a) Each certificate holder shall keep at his principal business office and make available for inspection by the Administrator the following:

• • • • • • •

(4) An individual record of each pilot used by him in operations subject to this part, including the following information:

• • • • • • •

(vi) The date and result of each of the initial and recurrent proficiency tests and instrument and route checks required by this part and the type of aircraft flown during that test or check.

• • • • • • •

(x) The date of the completion of the initial phase and each recurrent phase of the training required by this part."

[34] Section 135.37 provides as follows:

"§ 135.37 *Aircraft and facilities for recent flight experience.*

Each certificate holder shall provide aircraft and facilities to enable each of his pilots who is authorized to engage in IFR and multiengine operations to maintain and demonstrate his ability to conduct those operations."

[35] Section 135.59(b) provides as follows:

"§ 135. *Mechanical interruption summary report.*

Each certificate holder shall mail or deliver, before the end of the 10th day of the following month, a summary report of the following occurrences in multiengine aircraft for each month to the FAA District Office having jurisdiction over the area in which the certificate holder's principal business office is located:

• • • • • • •

(b) The number of propeller featherings in flight, listed by type of propeller and engine and airplane on which it was installed. . . ."

[36] Section 135.136(b) and (f) provides as follows:

"§ 135.136 *Flight and duty time limitations.*

• • • • • • •

(b) No certificate holder may assign a flight crewmember, and no flight crewmember may accept an assignment, for duty during

(*footnote continued on following page*)

(11) Air East knowingly utilized pilots as required flight crewmembers when such pilots had not received initial flight training, as required by section 135.137 of the FAR.[38] (See Tr. 3895)

(18) Air East continuously permitted, instructed, or knowingly authorized its pilots to use unsafe or unapproved practices or procedures in the operation of company aircraft as follows:

(a) Pilots were prohibited from using reverse pitch of propellers during landings. Such prohibition prevented the pilots from becoming proficient in the use of reverse propeller pitch in the event that its use was required in an emergency; (b) As a general rule, first officers were not permitted to execute takeoffs or landings and therefore did not

(*footnote continued from preceding page*)

flight time unless that assignment provides for at least 10 consecutive hours of rest during the 24-hour period preceding the planned completion of the assignment.

• • • • • •

(f) No certificate holder may assign any flight crewmember, and no flightcrew member may accept an assignment, for duty during flight time if he has been assigned to any duty with the certificate holder in connection with operations under this part during any required rest period."

[37] See footnote 5, *supra.*

[38] Section 135.137 provides as follows:

"§ 135.137 *Initial and recurrent training requirements.*

No certificate holder may use the services of, nor may any person serve as, a pilot or flight attendant crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which he is to serve since the beginning of the 12th calendar month before that service. This section does not apply to a certificate holder who uses only himself as a pilot."

maintain the proficiency expected of a pilot being utilized as a first officer. (See Tr. 3413)

(20) By reason of all of the circumstances pertaining to the operation of aircraft as alleged in the foregoing paragraphs (in the entire complaint), and in violations of the FAR or the Act specified therein, Air East repeatedly violated sections 605(a) of the Act.[39] (See Tr. 3907-3908)

The law judge concluded that safety in air commerce or air transportation and the public interest require the revocation of the air taxi/commercial operator certificate of Air East (Tr. 3908), and he thereupon affirmed the Administrator's order.

With respect to respondents Tallent, McKinney, and Wilkinson, the law judge found that the following charges were established by a preponderance of the evidence:

While serving as captain and pilot-in-command for Air East in the operation of aircraft carrying pasengers and/or cargo under Part 135 and/or while serving as pilot-in-command on operations under Part 91:

(a) On numerous occasions, while operating such aircraft under IFR, each respondent used instrument approach procedures at Johnston-Cambria and Martinsburg, Blair County (Altoona), Airports which had not been approved by the FAA in FAR Part 97, in

[39] Section 605(a) of the Act provides as follows:

"SEC 605. [72 Stat. 778, 49 U.S.C. 1425] (a) It shall be the duty of each air carrier to make, or cause to be made, such inspection, maintenance, overhaul, and repair of all equipment used in air transportation as may be required by this Act, or the orders, rules, and regulations of the Secretary of Transportation• issued thereunder. And it shall be the duty of every person engaged in operating, inspecting, maintaining, or overhauling equipment to

(*footnote continued on following page*)

violation of sections 91.116(a)[40] and 91.9[41] of the FAR and section 610(a)(5) of the Act.[42] (Tallent (Tr. 3910-3911); McKinney (Tr. 3917-3918); Wilkinson (Tr. 3925-3926)).

(b) On numerous occasions, while operating such aircraft under IFR, each respondent used altitude and/or visibility minimums at Johnston-Cambria and Martinsburg, Blair County (Altoona), Airports which were below those prescribed in the FAA-approved instrument approach procedures as described in FAR Part 97, in violation of sections 91.116(a)[43] and (b),[44] 91.117 (a) and (b),[45] and 91.9[46] of the FAR and section

(*footnote continued from preceding page*)

observe and comply with the requirements of this Act relating thereto, and the orders, rules, and regulations issued thereunder."

(* Footnote omitted.)

[40] See footnote 8, *supra.*

[41] See footnote 3, *supra.*

[42] See footnote 5, *supra.*

[43] See footnote 8, *supra.*

[44] Section 91.116(b) provides as follows:

"§ 91.116 *Takeoff and landing under IFR: General.*

(b) *Landing minimums.* Unless otherwise authorized by the Administrator, no person operating an aircraft (except a military aircraft of the United States) may land that aircraft using a standard instrument approach procedure prescribed in Part 97 of this chapter unless the visibility is at or above the landing minimum prescribed in that part for the procedure used. If the landing minimum in a standard instrument approach procedure prescribed in Part 97 of this chapter is stated in terms of ceiling and visibility, the visibility minimum applies. However, the ceiling minimum shall be added to the field elevation and that value observed as the MDA or DH, as appropriate to the procedure being executed."

[45] See footnote 11, *supra.*

[46] See footnote 3, *supra.*

610(a)(5) of the Act[47] (Tallent (Tr. 3911-3912); McKinney (Tr. 3918-3920); Wilkinson (Tr. 3926)).

(c) On more than one occasion while operating such aircraft under IFR, each respondent deviated from an ATC (air traffic control) clearance that had been accepted and acknowledged, without obtaining an amended clearance, in violation of sections 91.75(a)[48] and 91.9[49] of the FAR and section 610(a)(5) of the Act.[50] (Tallent (Tr. 3912-3913); McKinney (Tr. 3920-3921); Wikinson (Tr. 3926-3927)).

(d) On more than one occasion, each respondent operated an aircraft under VFR when he did not maintain the minimum distance from clouds as prescribed in, and in violation of, sections 91.105(a)[51] and 91.9[52] of the FAR and section 610(a)(5) of the Act.[53] (Tallent

[47] See footnote 5, *supra.*

[48] Section 91.75(a) provides as follows:

"§ 91.75 *Compliance with ATC clearances and instructions.*

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from cancelling an IRF flight plan if he is operating the VFR weather conditions."

[49] See footnote 3, *supra.*

[50] See footnote 5, *supra.*

[51] Section 91.105(a) provides, in pertinent part, as follows:

"§ 91.105 *Basic VFR weather minimums.*

(a) Except as provided in § 91.107, no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from clouds that is less, than that prescribed for the corresponding altitude in the following table: (Table omitted.)

[52] See footnote 3, *supra.*

[53] See footnote 5, *supra.*

(Tr. 3913-3914;); McKinney (Tr. 3921); Wilkinson Tr. 3927)).

(e) On more than one occasion, respondents Tallent and McKinney[54] each operated an aircraft which was not in an airworthy condition and failed to discontinue such flight or flights when unairworthy mechanical conditions existed, in violation of section 91.29(a)[55] and (b)[56] of the FAR and section 610(a)(5) of the Act.[57] (Tallent (Tr. 3914); McKinney (Tr. 3921-3922))

(f) Each respondent operated aircraft on numerous occasions when such aircraft either exceeded the maximum certificated takeoff weight and/or were outside the approved center of gravity limits, in violation of sections 91.31(a)[58] and 91.9[59] of the FAR and section 610(a)(4) and (5) of the Act.[60] (Tallent (Tr. 3915); McKinney (Tr. 3922); Wilkinson (Tr. 3928)).

(g) Between April 29, 1973, and the present time, respondents McKinney and Wilkinson[61] knowingly and

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[54] Respondent Wilkinson was not charged under this paragraph.

[55] See footnote 19, *supra.*

[56] Section 91.29(b) provides as follows:

"§ 91.29 *Civil aircraft airworthiness.*

* * * * * *

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. He shall discontinue the flight when unairworthy mechanical or structural conditions occur.

[57] See footnote 5, *supra.*

[58] See footnote 4, *supra.*

[59] See footnote 3, *supra.*

[60] See footnote 5, *supra.*

[61] Respondent Tallent was not charged under this paragraph.

continuously served as pilot in Beechcraft model 99 aircraft when each had not passed a flight check in that type of aircraft, given by the Administrator or an authorized check pilot in that type of aircraft since the beginning of the 12th calendar month before that service, in violation of section 135.138(b) of the FAR[62] and section 610(a)(5) of the Act[63] (McKinney Tr. 3922-3923); Wilkinson Tr. 3928-3920)).

(h) From April 29, 1973, to date, respondents McKinney and Wilkinson[64] knowingly and continuously served as pilot-in-command of a flight under IFR when each had not passed a routes-and-airports flight check given by the Administrator or by an approved check pilot in violation of section 135.122(a) of the FAR[65] and section 610(a)(5) of the Act.[66] (McKinney (Tr. 3923-3924); Wilkinson (Tr. 3929)).

(i) From April 30, 1973, to date,[67] each respondent continuously and knowingly served as pilot in command under IFR when he had not passed an instrument check given by the Administrator or by an approved check pilot, in violation of section 135.131(a) and (b) of the FAR[68] and section 610(a)(5) of the

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[62] See footnote 29, *supra.*

[63] See footnote 5, *supra.*

[64] Respondent Tallent was not charged under this paragraph.

[65] See footnote 28, *supra.*

[66] See footnote 5, *supra.*

[67] In the case of respondent Tallent, this period ran from April 30 to October 18, 1973.

[68] See footnote 31, *supra.*

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Act.[69] (Tallent (Tr. 3915-3916); McKinney (Tr. 3924); Wilkinson (Tr. 3929)).

The law judge dismissed the charge against the above three respondents regarding the alleged exceeding of crew duty and rest times prescribed by section 135.136(b) and (f) of the FAR.

The law judge then affirmed the orders revoking the airman certificates of respondents Tallent, McKinney, and Wilkinson.

With respect to Air East (the repair station), the law judge found that the following charges were established by a preponderance of evidence:

> (2) Air East, in performing maintenance or alterations on aircraft under authority of its repair station certificate, on several occasions, approved such aircraft for return to service without having performed such required work in such a manner, and using materials of such quality, that the condition of such aircraft was equal to its original or properly altered condition, in violation of sections 43.13(a) and (b)[70],

[69] See footnote 5, *supra*.

[70] Section 43.13(a) and (b) provides as follows:

"§ 43.13 *Performance rules (general).*

(a) Each person maintaining or altering, or performing preventive maintenance, shall use methods, techniques, and practices acceptable to the Administrator. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use

(*footnote continued on following page*)

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> 43.15(a)[71] and 145.57(a)[72] of the FAR (Tr. 3930-3931). (a) Air East, in exercising the authority and privileges of its repair station certificate, on numerous occasions, required, permitted, or caused aircraft, airframes, engines, instruments, or accessories which Air East had maintained or altered to be approved for return to service without such articles having been inspected and determined to be airworthy by a qualified inspector. This was accomplished by nonqualified personnel and the subsequent making of fraudulent or intentionally false entries and certifications in the aircraft records. By reason of such actions, Air East

(*footnote continued from preceding page*)

materials of such a quality, that the condition of the aircraft, airframe, aircraft engine propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness)."

[71] Section 43.15(a) provides as follows:

"§ 43.15 *Additional performance rules for inspections.*

(a) *General.* Each person performing a 100-hour, annual, or progressive inspection required by Part 91 of this chapter or an inspection required under Part 123 of this chapter, shall perform those inspections in such a manner as to determine whether the aircraft concerned meets all applicable airworthiness requirements."

[72] Section 145.57(a) provides as follows:

"§ 145.57 *Performance standards.*

(a) Except as provided in § 145.2, each certificated domestic repair station shall perform its maintenance and alteration operations in accordance with the standards in Part 43 of this chapter. It shall maintain, in current condition, all manufacturers' service manuals, instructions, and service bulletins that relate to the articles that it maintains or alters."

repeatedly violated sections 145.59(a)[73], 43.5[74] and 43.11(a)[75] of the FAR. (Tr. 3931-3932)

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[73] Section 145.59(a) provides as follows:

"§ 145.59 *Inspection of work performed.*

(a) Each certificated domestic repair station shall, before approving an airframe, powerplant, propeller, instrument, radio, or accessory for return to service after maintaining or altering it, have that article inspected by a qualified inspector. After performing a maintenance or alteration operation, the station shall certify on the maintenance or alteration record of the article that it is airworthy."

[74] Section 43.5 (a) provides as follows:

"§ 43.5 *Return to service after maintenance, preventive maintenance, rebuilding, or alteration.*

(a) No person may return to service any aircraft, airframe, aircraft engine, propeller, or appliance, that has undergone maintenance, preventive maintenance, rebuilding, or alteration unless—

(1) It has been approved for return to service by a person authorized under § 43.7;

(2) The maintenance record entry required by § 43.9 has been made;

(3) The repair or alteration form authorized by or furnished by the Administrator has been executed in a manner prescribed by the Administrator; and

(4) If a repair or an alteration results in any change in the aircraft operating limitations or flight data contained in the approved aircraft flight manual, those operating limitations or flight data are appropriately revised and set forth as prescribed in § 91.31 of this chapter."

[75] Section 43.11(a) provides as follows:

"§ 43.11 *Content, form, and disposition of annual, 100-hour, and progressive inpection records.*

(a) *Maintenance record entries.* The person approving or disapproving for return to service an aircraft, airframe, aircraft engine, propeller, or appliance after any annual, 100-hour, or progressive inspection required by Part 91 of this chapter shall make

(*footnote continued on following page*)

(4) On numerous occasions, Air East, when performing work and inspections under authority of its repair station certificate, failed to maintain proper and adequate records, naming the persons who supervised and/or inspected that work, in that the records maintained by Air East failed to name the person actually supervising and/or inspecting that work and then fraudulently and/or intentionally falsified the record to show that such supervision and/or inspection had been performed by an authorized and qualified person,

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(*footnote continued from preceding page*)

an entry in the maintenance record of that equipment, containing the following information:

(1) The type of inspection (and for progressive inspections, a brief description of the extent of the inspection).

(2) The date of the inspection and aircraft time in service.

(3) The signature (and if a certificated mechanic, the certificate number) of the person approving or disapproving for return to service, the aircraft, airframe, aircraft engine, propeller, or appliance.

(4) For annual or 100-hour inspections if the aircraft is approved for return to service, the following or a similarly worded statement—'I certify that this aircraft has been inspected in accordance with (insert type) inspection and was determined to be in airworthy condition.'

(5) For annual inspections, if the aircraft is not approved for return to service because of needed maintenance, noncompliance with applicable specifications, airworthiness directives or other approved data, the following or a similarly worded statement—'I certify that this aircraft has been inspected in accordance with an annual inspection and a list of discrepancies and unairworthy items dated (date) has been provided for the aircraft owner or lessee.'

(6) For progressive inspections, the following or a similarly worded statement—'I certify that in accordance with a progressive inspection program, a routine inspection of (identify whether aircraft, or components) and a detailed inspection of (identify components) were performed in accordance with a progressive inspection and the aircraft is approved for return to service.'"

in violation of section 145.61 of the FAR[76] (Tr. 3932-3933).

The law judge dismissed a general charge, based on the above actions, alleging a violation of section 610(a)(7) of the Act.

The law judge thereupon concluded that the order revoking Air East's repair station certificate should be affirmed.

Finally, in regard to Respondent Reddecliff, the law judge found that the following charges had been established by a preponderance of the evidence.

(4) On numerous occasions, when serving in his capacity as chief of maintenance for Air East, Reddecliff:

(a) Performed, and/or supervised the performance of, work on aircraft in such a manner and/or used or permitted the use of materials of such quality that the condition of such aircraft worked on was not at least equal to its original or properly altered condition, and he permitted such aircraft to be returned to service in such condition, in violation of section 43.13(a) and (b)[77] of the FAR and sections 605(a)[78] and 610(a)(2)[79] of the Act (Tr. 3935-3936).

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[76] Section 145.61 provides as follows:

§" 145.61 *Performance records and reports.*

Each certificated domestic repair station shall maintain adequate records of all work that it does, naming the certificated mechanic or repairman who performed or supervised the work, and the inspector of that work. The station shall keep each record for at least two years after the work it applies to is done."

[77] See footnote 70, *supra.*

[78] See footnote 39, *supra.*

[79] See footnote 30, *supra.*

(b) Knowingly authorized, permitted or caused aircraft on which Air East repair station had performed maintenance or alterations to be inspected, certified as airworthy and returned to service by persons who were not authorized and qualified to perform such functions. In this connection, he instructed or allowed unqualified persons to perform such inspections and to return such aircraft to service by fraudulently or intentionally forging his signature or that of another qualified inspector in the aircraft records. By reason of the foregoing actions, he violated section 43.5(a)[80] of the FAR and section 605(a)[81] and 610(a)(2) of the Act[82] (Tr. 3936-3937). The law judge thereupon affirmed the order revoking Reddecliff's mechanic certificate.

Both the Administrator and the respondents have appealed from the law judge's decision, and each party has submitted an appeal brief. The Administrator argues that the law judge erred in dismissing charges regarding (1) the scheduling of pilots for duty in excess of the maximum allowable 14 hours in any 24 consecutive hours and/or without the required 10 hours of continuous rest in any 24-hour period, and (2) the utilizing of services of pilots in Part 135 operations who had not completed the appropriate initial or recurrent training. The Administrator also urges the Board to consider the various offers of proof which were made by the Administrator during the course of the hearing but which were excluded from consideration by the law judge in reaching his decision. Finally, the Administrator urges the Board to uphold the law judge's affirmation of the orders of revocation.

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[80] See footnote 74, *supra.*

[81] See footnote 39, *supra.*

[82] See footnote 30, *supra.*

Respondents have submitted a voluminous (120-page) brief in which they allege a number of procedural and evidentiary defects in the Administrator's case, in the entire proceeding, and in the initial decision. They urge, in conclusion, that the findings of the law judge are not supported by substantial, reliable, and probative evidence and should be reversed and the charges dismissed. The specific arguments raised on appeal by respondents are discussed *in seriatim* hereinbelow.

Respondents have also moved to dismiss the Administrator's appeal on the grounds that said appeal was untimely filed. Board rules provide that a notice of appeal must be filed within 2 days after the initial decision has been orally rendered. In this instance, the due date was April 28, 1974, but the Administrator's appeal was not filed until April 29, 1974.

The Administrator in turn has replied to the motion to dismiss, arguing that the due date for the notice of appeal was April 29 since April 28 fell on a Sunday;[83] that, in any event, no prejudice to respondents would result from the Board's consideration of the Administrator's appeal; and that the Board should follow its often stated preference of disposing of appeals on the merits rather than on a procedural ground.

The Administrator has also filed a reply brief in opposition to respondent's appeal.

Finally, respondents have submitted a reply brief in which they renew their motion to dismiss the Administrator's appeal and further urge, in the alternative, that

[83] Part 421.7 of the Board's rules provides that Sundays shall be counted in the computation of time in emergency cases. That provision further provides that the last day of the period so computed is to be included unless it is a Saturday, Sunday, or holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a holiday.

the law judge's dismissal of the specified charges should be upheld.

Respondents have also requested oral argument before the Board. Their request is denied on the basis that the issues in this proceeding have been exhaustively litigated and, in our view, no useful purpose would be served by further argument.

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's orders revoking the certificates of all six respondents. Except as modified herein, we adopt as our own the findings of the law judge.

The specific points argued in respondents' brief, and the Board's disposition thereof, are as follows:

Point I—The complaints herein should have been dismissed for failure to comply with the Board's rules and the law judge's orders to supply specific factual information.

At the prehearing conference and again at the commencement of the hearing, Judge Woodlock directed the Administrator to file bills of particulars setting forth specifics (e.g., names, dates, places, aircraft numbers, etc.) regarding the charges in the complaints. Bills of particulars were filed, and throughout the hearing the law judge restricted testimony from the Administrator's witnesses to conform to the bills of particulars. At the conclusion of the presentation of evidence, the law judge, in rejecting respondents' proposed finding of dismissal, found that "the complaint as supplemented by the bill of particulars while concededly not a masterpiece of legal drafting is sufficient to advise the respondents of the charges against them and to meet them." (Tr. 3848.)

We agree with the law judge on his above assessment of the complaints and with the conclusion that the complaints, as supplemented by the bills of particulars, were sufficient in their specificity to comply with the Board's rules.[84] We recognize that specificity regarding dates, aircraft numbers, etc., was lacking in some respects by the inability of the former Air East pilots and mechanics who were called to testify at the hearing to recall specifics.[85] As the law judge apparently concluded, however, the Administrator was as specific as the nature of the evidence allowed him to be. Moreover, and most important, it appears to the Board that respondents were sufficiently apprised of the Administrator's case to allow them to prepare their defense adequately.[86] Finally, respondents' argument that no emergency existed, since the Administrator himself did not personally so certify, is lacking in merit in view of the fact that the Associate General Counsel, who signed the orders of revocation, has been delegated the authority by regulation to take certificate action[87] and thereby acts as the representative of the Administrator.

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[84] Section 421.23(b) of the Board's rules provides that "If the Administrator claims that respondent lacks qualification as an airman, the order filed as the complaint, or an accompanying statement, shall recite on which of the facts pleaded this contention is based."

[85] Efforts to refresh recollection were to some extent hampered by (a) the fact these pilots and mechanics naturally did not record acts which were in violation of the FAR, and (b) Air East records were in some instances falsified to hide violations.

[86] We also note that the law judge directed the Administrator to provide respondents with copies of the depositions of those witnesses who had been deposed prior to the hearing. Respondents were thus aware of the heart of the Administrator's case in advance of the hearing.

[87] See Part 13.19(b) of the FAR.

Point II—Revocation of respondents' licenses without a prior hearing was a violation of due process of law.

As respondents recognize in their brief, the Administrator has the clear statutory authority to issue a revocation order without a prior hearing where an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order.[88] The Board has consistently held that it lacks authority to review the Administrator's decision to invoke his emergency authority. We would nevertheless point out that the fact that Air East operated without incident during the 6-week period of the Administrator's investigation does not belie the existence of an emergency within the intendment of the statute. Moreover, with respect to the length of this investigation, it would be irresponsible for the Administrator to invoke such extraordinary authority unless grounded on a thorough investigation.

Point III—Respondents herein have been denied procedural due process of law.

Respondents' first argument under the heading of due process regards lack of specificity of the charges. This argument is basically the same as that made under Point I, and our view is likewise the same—namely, that the degree of specificity of the complaints, as supplemented by the bills of particulars, met the due process requirement of notice.

Respondents next argue that there was an inadequate amount of time to prepare a defense and to prepare an appeal from the initial decision. In emergency proceedings, the Board is required by statute (section 609 of the

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[88] Section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429).

Act) to dispose of the appeal within 60 days after being advised that an emergency exists. This time constraint was designed to assure that an airman, whose certificate would be immediately affected by an emergency order, would receive an expedited hearing and a speedy disposition of his appeal. The Board's Rules of Practice governing emergency cases[89] contain procedures and compressed time limits which are necessary to assure disposition of the appeal within the allotted period. In this particular instance, the hearing commenced 14 days after the emergency orders were served on respondents. As found hereinabove, the specificity of the charges met due process. We are further satisfied that the rights of respondents were consistently upheld throughout the hearing by the law judge, whose rulings strictly limited the Administrator to the matters described in the bills of particulars.[90] We recognize that the unusual length of the hearing (25 days) produced a record of such proportions that preparation of an appeal brief, particularly within the compressed time limits, became a difficult task. Nevertheless, adherence to these time limits is necessary if the Board is to dispose of the case within the statutory period. We might also add that the Board has seen few briefs which can compare with respondents' in terms of a thorough, detailed presentation of all the relevant issues.

Point IV—Many of the alleged violations are over 6 months old and should have been dismissed for staleness.

The Board's rules contain a provision which subjects, to a motion to dismiss, allegations of offenses which occurred

[89] Section 421.38, *et al.*

[90] In denying an interlocutory appeal filed by the Administrator, the Board affirmed the law judge's ruling so limiting the testimony of the Administrator's witnesses. NTSB Order No. EA-569, April 8, 1974.

more than 6 months prior to the Administrator's advising respondent as to reasons for the proposed action under section 609 of the Act.[91] A motion to dismiss a complaint as stale does not apply, however, where an issue of lack of qualification would be presented if the allegations are assumed to be true. In this instance, the allegations in the complaint clearly presented an issue of qualification and therefore the law judge acted properly in denying respondents' motion to dismiss.[92]

Point V—The Administrator made an improper attempt to influence the Board and the law judge by supplying them with prejudicial material outside of the record.

Respondents' argument on this point is based on a letter sent by the Administrator to the Chairman of the Safety Board on March 22, 1974, which led the Chairman to disqualify himself from any further participation in this proceeding.[93] As the four undersigned Members have previously stated,[94] nothing can be discerned regarding the aforesaid letter, or indeed any other matter, which would constitute grounds for disqualifying them from adjudicating the merits of this case. Accordingly, and without condoning the action of the Administrator in sending the letter, it cannot be concluded that the letter in itself provides a valid reason for dismissing the complaints.

[91] Section 421.25 of the Board's Rules of Practice.

[92] Lack of qualification can be established by regulatory violations sufficiently serious in nature to demonstrate a lack of the degree of care, judgment, and responsibility required of a certificate holder.

[93] See NTSB Order No. EA-568, April 8, 1974.

[94] *Id.*

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Point VI—Respondents have been prejudiced by the deliberate destruction of notes taken by the Board and FAA employees of witnesses' oral statements.

A Safety Board investigator, to whom several Air East pilots gave oral statements during an aircraft accident investigation,[95] took notes of these conversations and later destroyed the notes after briefing the Board. At a subsequent meeting among Board and FAA officials, one of the latter took notes and also later destroyed them. Obviously, any destruction of notes is "deliberate"; however, there is nothing to indicate that the destruction of these notes was for any other reason than that said notes were of no further use to the individuals who took them. Certainly, there is no inference in the record that the destruction of the notes was somehow designed to frustrate respondents' defense against the charges. Nor can we agree with respondents that the above individuals were under a duty to preserve this type of note and that destruction thereof is therefore tantamount to a denial of due process of law.[96]

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[95] The relationship between the accident investigation and the immediate proceeding is explained in Order EA-568, *supra*.

[96] It should also be noted that, with respect to former statements of witnesses which might be of use in impeaching those witnesses, respondents were provided copies of their depositions taken during the FAA's investigation of Air East. Moreover, the judicial decision cited by respondents in support of this point is inapposite since it involved a criminal proceeding in which the item at issue was the recordation of a conversation between defendants and an undercover agent. *U.S.* v. *Bryant,* 439 F. 2d 642 (1971).

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Point VII—The findings by the law judge are not in accord with section 421.32(b) and new findings are required.

Section 421.32(b) of the Board's rules reads as follows:

> "(b) *Contents.* The initial decision shall include a statement of findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact (including credibility of witnesses, where such finding is material), law, or discretion, presented on the record, and the appropriate sanction or denial thereof."

In our judgment, the initial decision, which covers some 91 transcript pages, clearly meets the requirements of the above section in that it disposes of all legal and procedural arguments made by the parties, makes unequivocal findings of credibility, and spells out the evidence of record which supports each of the charges found to be established by the law judge. Consequently, there is no need to remand the case to the law judge for more specific findings.[97]

Point VIII—The findings must be supported by a preponderance of reliable, probative, and substantial evidence.

We, of course, agree with the above proposition and will deal below with the ultimate issue of whether the findings of the law judge regarding the charges against respondents are so supported by the record.

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[97] The law judge's findings on the charges are discussed in detail hereinbelow; where the record warrants modification of these findings, or new findings, our opinion so states.

Point IX—The law judge failed to give proper consideration to the responsibility of the pilot-in-command.

Respondents, in effect, maintain that Air East management cannot be held responsible for violations committed by a captain who, as pilot-in-command, "is directly responsible for, and is the final authority as to, the operation of that aircraft."[98] Although management personnel were not present in the aircraft when the violations by nonmanagement pilots were committed, we nevertheless find that management of a company can be held accountable for pilot violations which are the direct product of management-inspired policies and procedures. Thus, when management instructs its pilots in the use of improper and unsafe techniques, and permits and encourages such practices to flourish, it cannot escape responsibility by hiding behind the authority of the pilot-in-command. To hold otherwise would be to render meaningless the entire regulatory concept under which the operator of a flight must assume responsibility, particularly for those violations of which it was aware or which it initiated.

Point X—The law judge took a totally unrealistic viewpoint on the issue of credibility, improperly limited examination on the issue, and his findings relating thereto are unworthy of consideration by the Board.

With respect to the examination by respondents' attorney of the FAA lawyer who conducted the investigation of Air East, the law judge limited the interrogation only when this

[98] The quoted language is taken from section 91.3(a) of the FAR.

witness was asked whether he would recommend that enforcement action be taken against the certificate of former Air East pilots and mechanics who gave testimony damaging to Air East. The law judge, in our view, did not abuse his discretion in so ruling, particularly in light of the fact that he permitted respondents' attorney considerable leeway in questioning this same witness, and indeed many of the former Air East pilots and mechanics, about any promises of immunity made by the FAA. The thrust of the answers to these questions was that no immunity was granted but that the individual witness' cooperation would be taken into consideration by the Administrator in determining whether enforcement action would be taken. In our judgment, such an approach was neither improper nor calculated to elicit false testimony. Furthermore, we fully concur with the law judge that the manner in which the Administrator investigated and developed his case does not constitute grounds for rejecting the credibility of the witnesses making up that case.

It is apparent from the record that witness credibility was a key element to a resolution of the charges, since the testimony of respondents Tallent, McKinney, Wilkinson and Reddecliff was, in large part, diametrically opposed on key points to the testimony of the 17 pilots and the 4 mechanics who appeared for the Administrator. The law judge clearly and unequivocally chose to reject the testimony of respondents and to accept that of the Administrator's witnesses. Respondents have cited nothing in their brief that would prompt us to overturn the law judge's finding on credibility. Judge Woodlock presided over 25 days of testimony, observed firsthand the demeanor of each witness, and therefore was in the best position to gauge their veracity. The fact that his acceptance of the credibility of the Administrator's witnesses was total, as was his rejection of respondents' testimony, does not diminish

the strength or logic of his findings, but rather reflects the convincing nature of the Administrator's case and the basic consistency in the testimony of numerous witnesses in describing a pattern of conduct on the part of Air East. We share that view of the evidence.

Point XI—The charges against Respondent Air East (Repair Station) are not supported by reliable, probative, and substantial evidence.

The law judge's finding that Charge 2 was established was based on an incident which occurred on January 11, 1974. A designated inspector for Air East (Agnello) testified that Respondent Reddecliff instructed him on that date to sign off a then overdue inspection as if it had been performed on January 10th. In fact, the inspection was not accomplished until January 12th. Respondent Reddecliff denies that he so instructed Agnello. The law judge chose to accept the testimony of Agnello, and we can discern no valid reason to overturn that finding.[99]

Charge 3 was established, in the law judge's findings, by the testimony of two mechanics (Orlowsky and Panarella) who testified that they signed Respondent Reddecliff's name on the aircraft logs as certifying that the aircraft was airworthy for return to service.[100] Orlowsky testified that

[99] Testimony by Respondent Reddecliff that he was informed by an FAA inspector that the aircraft was within a 10-hour grace period was uncorroborated hearsay and therefore entitled to little weight. We also note that Agnello's testimony was corroborated by Underwood, an Air East pilot at the time of the incident (Tr. 1560-1565).

[100] Their testimony was corroborated by an FBI agent who concluded, based on an examination of the pertinent records, that not all of the signatures of Reddecliff were made by the same person.

Reddecliff instructed him to so sign, while Panarella stated that he signed Reddecliff's name when the latter was not available and that Reddecliff was aware of this fact.

Respondents argue nevertheless that Orlowsky and Panarella, as holders of mechanics certificates with airframe and powerplant ratings, were authorized under the regulations and the manual to return an aircraft to service as airworthy. We do not agree with respondents' interpretation of the regulations. The maintenance and inspection of work performed was accomplished as part of a function of the Air East repair station and, under section 145.59 of the FAR, the inspection and certification as airworthy must be accomplished by a qualified inspector.[101] Orlowsky testified that he was not authorized to sign off the aircraft, since he was not an inspector, and that what he did was improper. The import of the regulations is to assure that only a qualified inpector certifies that the plane is airworthy. In these instances, there is no guarantee that the aircraft were airworthy since they were not inspected and certified by a qualified inspector.[102]

Charge 4 was established by the same basic evidence cited above in regard to Charge 3—namely, that the records were falsified by persons not qualified as inspectors signing Respondent Reddecliff's name. Reddecliff averred that following Agnello's termination of employment,[103] Reddecliff designated Orlowsky as an inspector. Orlowsky, on the other hand, stated that he was never so designated, and it is apparent that the law judge chose to believe Orlowsky.

[101] We agree with Judge Woodlock that an Air East mechanic was authorized to sign off as airworthy only the work he himself performed.

[102] We also note that Orlowsky testified that, when signing Reddecliff's name, he did not always check the work of other mechanics to determine if it was airworthy.

[103] Only Reddecliff and Agnello were designated as inspectors.

In sum, the record with respect to the repair station reveals a practice of intentional falsification of records to cover up improprieties regarding the overdue date of an inspection and the fact that aircraft were being certified as airworthy by unqualified personnel. In our judgment, these practices demonstrate that Air East lacks the requisite qualifications to hold a repair station certificate which is therefore subject to revocation.

Point XII—The charges against Respondent Thomas Reddecliff are not supported by reliable, probative, and substantial evidence.

In support of Charge 4(a) against Respondent Reddecliff, the law judge cited the operation of aircraft 133AE with an inoperative PN 101 (course director). Mechanic Panarella testified that portions of this system were removed and sent out for repair or overhaul but that the aircraft still flew during this period. Reddecliff's testimony again conflicted with that of Panarella, but again it is apparent that the law judge chose not to credit the former's version. Panarella also testified that on aircraft 125AE the altimeters were reported to have a 150-foot difference between them and that this problem was worked on over a period of 1 to 2 weeks during which the aircraft continued to be flown. A number of pilots testified that they had been instructed by Respondent Reddecliff, *inter alia,* not to enter "no go" items in the log book, but rather to report these items orally or on a separate piece of paper. In addition, Air East mechanics stated that such items were not entered in the log book until they were corrected and signed off.

The charges against Respondent Reddecliff under Charge 4(b) are basically the same as those listed under Charges 3 and 4 against the repair station, which are discussed hereinabove and need not be reiterated except to state

that such charges (basically, falsification of records to cover up the fact that inspections were done by unqualified persons) were established.

As the person in charge of maintenance, Respondent Reddecliff clearly was derelict in his duties and the fact that he was directly responsible for the practices discussed above demonstrates that he lacks the qualification to hold a mechanic certificate.

Points XIII, XIV, and XV—The charges against Respondents Tallent, McKinney, and Wilkinson are not supported by reliable, probative, and substantial evidence.[104]

Testimony from numerous Air East pilots clearly established that Respondents Tallent, McKinney, and Wilkinson, as a regular practice, conducted unauthorized approaches to Johnstown and Altoona Airports (Charge 4(a)), and, while operating under IFR on such approaches, used altitude and/or visibility minimums below those prescribed in approved procedures (Charge 4(b)).[105] As part of a management-initiated policy, these respondents conducted circling or straight-in approaches not depicted on the approach plates and descended to "company minimums" well below the prescribed MDA (minimum descent altitude) under actual instrument conditions. Furthermore, the pilots describing those incidents made no mention of ATC clearances, weather conditions, or visual sighting which might have justified otherwise unauthorized procedures.

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[104] In view of the similarity of the charges against these three respondents, they will be treated together.

[105] The fact that approved approach procedures for each airport are not published in section 97 of the FAR does not render that provision invalid nor does it mean that pilots are not bound by such procedures. As stated in section 97.10, and as understood by all pilots, standard instrument approach procedures are portrayed on individual charts or approach plates.

Pilot testimony also established that Respondents Tallent, McKinney, and Wilkinson, while operating under IFR, deviated from an ATC clearance without obtaining an amended clearance (Charge 4(c)). These deviations often involved use of company prescribed "alpha altitudes," which in effect allowed an Air East pilot to cruise at 500 feet above or below the assigned altitude in order to provide the passengers a smoother ride. Former Air East pilots further testified that the three respondents, while operating under VFR, flew through clouds or failed to maintain the minimum separation from clouds prescribed by section 91.105(a) of the FAR (Charge 4(d)).

Testimony of numerous Air East pilots also establishes that Respondents Tallent and McKinney operated aircraft which were not in an airworthy condition and failed to discontinue flights when unairworthy conditions existed (Charge 4(e)) and that all three respondents operated aircraft in excess of the maximum certificated takeoff weight and/or when the center of gravity was outside approved limits. These violations were obviously part of Air East practices whereby aircraft would be operated even before "no go" items could be corrected and whereby fuel and baggage weights would be "fudged" to come within limits or the center of gravity would not be computed until after takeoff.

Finally, the record establishes, during certain specified periods of time, Respondents McKinney and Wilkinson served as pilot-in-command under IFR when they had not passed the instrument check required by section 135.131(a) of the FAR;[106] that Respondents McKinney and Wilkinson served as pilot-in-command under IFR when they had not passed a routes-and-airports flight check required by section 135.122(a); and that Respondent McKinney served as pilot in Beechcraft Model 99 aircraft when he had not passed a flight check in that type of aircraft, as required by section 135.138(b). Testimony in support of the above charges was supplied by Luther (the only designated check pilot in the employ of Air East) who testified that he did not give respondents the various check rides which would have made it legal for them to operate during the periods specified in the complaints.

[106] With respect to Respondent Tallent, Luther recalled that he had given Tallent an instrument check ride (Tr. 2564), but Luther's search through aircraft logs did not reveal such a flight (Tr. 2605). On balance, we believe the evidence is insufficient to support this charge, which is therefore dismissed.

The respondents denied the various charges against them, and during their testimony offered explanations of an exculpatory nature.[107] The law judge rejected their testimony in favor of the testimony of the numerous Air East pilots who described the incidents in which regulatory violations were committed by respondents. Again, we have no reason to overturn the law judge's findings on credibility. In this connection, we note, as did the law judge, that many of the former Air East pilots were highly qualified and would not likely have been unaware of circumstances which, as respondents alleged, justified the deviations. Furthermore, the fact that these witnesses could not, in all instances, recall the specific dates of the occurrences does not, in our view, diminish the overall weight to be accorded their testimony.

Based on the foregoing, it is clear to the Board that all three respondents regularly engaged in practices which were not only in contravention of the regulations[108] but

[107] For example, they described "company minimums" as the altitude to which pilots could descend after runway environment had been sighted and which was to be maintained until the runway itself was sighted.

[108] Respondents contend that sections 91.9 and 91.29(a) and (b) are unconstitutionally vague. The short answer to this contention is that the Board lacks authority to entertain attacks on the constitutional validity of a section of the FAR. The Board has, however, considered the standards set forth in these regulations and has found them sufficiently specific to support the imposition of a sanction against an airman for failure to comply therewith. See *Administrator* v. *Galloway*, 1 N.T.S.B. 2104 (1972).

which were patently unsafe. It therefore follows that these respondents have demonstrated that they are unqualified to hold a pilot certificate.

Point XVI—The findings with respect to Air East d/b/a Allegheny Commuter are not supported by reliable, probative, and substantial evidence.

Charges 2, 3 and 4 concern aircraft weight and center of gravity. Numerous former Air East pilots testified that there was a consistent policy, perpetrated by Air East management, whereby weights would be "fudged" in order to bring the aircraft weight and/or center of gravity within prescribed limits at the time of takeoff. For example, on an IFR flight carrying 15 passengers, pilots were instructed to list only certain specified weights regarding fuel and baggage, even though the actual figures were in excess of those weights. Thus, the load manifest was falsified and the aircraft departed at a weight above the maximum certificated takeoff weight.

Pilots also testified that they were instructed by management, when operating on a mail cargo run, to stick to the schedule and, if necesary, not to recompute the aircraft loading until after takeoff. These pilot therefore had no way of knowing whether the center of gravity of the plane was within limits at the time of departure.

The fact that weight and balance is predicated on approximate rather than actual weights does not, in our view, invalidate the charges described above. Nor can we accept respondents' construction of section 135.43(c) as a mere recordkeeping requirement which could be met by filling out a load manifest *after* takeoff. We concur in the law judge's interpretation of that provision—namely, that preparation of a load manifest is meaningless unless accomplished prior to takeoff so that a pilot knows whether

the aircraft is within the prescribed limits. Moreover, management's explanation that the standard fuel and baggage figures were nothing more than precomputed amounts to fit a flight profile was rejected by the law judge. Again, we have no reason to overturn that finding of the law judge, which rests on credibility.

Charges 5 and 6 concern use of unauthorized approach procedures and of a minimum altitude and visibility below the prescribed figures. These charges were discussed hereinabove with respect to similar charges made against Respondents McKinney, Tallent, and Wilkinson. It will suffice to say that not only does the record establish that such practices were commonplace at Air East, but that they were initiated and encouraged by management.

Another commonplace Air East practice was that described under Charge 7—namely, that Air East made numerous flight operations into and out of Johnstown Airport during weather conditions less than the VFR minimums when the Johnston FSS was not in operation and without the pilots being given weather reports from an accredited observer. The FSS was closed from 11 p.m. until 7 a.m., a period during which Air East had scheduled arrivals and departures.[109] The regulations require, during such a period, weather reports from an accredited observer when IFR conditions prevail. Although Air East employed one such observer, pilots on inbound flights testified that they never secured weather reports from him. In addition, mechanics on night duty stated that they never saw this individual at the field.[110] Rather,

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[109] A mail flight arrived at 2:30 a.m. and a passenger flight departed at 6:50 a.m.

[110] Generally, he did not come in until the beginning of the normal working day, when he would be seen filling out forms presumably containing weather observations purportedly made during the preceding night.

pilots would receive their reports from the mechanics via company radio or they would obtain no weather at all. Similarly, on departures, when they took off prior to the opening of the FSS, the only weather observations relied on by the pilots were their own.[111] There was even some testimony that some inbound flights would delay their arrival at Johnstown, and that some outbound flights would expedite their departure, to avoid exposure to FSS personnel going off or coming on duty.

Turning to Charge 8, both pilots and mechanics alike testified that it was a standard practice at Air East for flight personnel to report discrepancies (particularly, "no go" items) either orally or on a separate sheet of paper and for entries of such discrepancies not to be entered in the aircraft log until they had been corrected. Furthermore, the aircraft would continue to be operated during the period that these items were in a state of disrepair. It is therefore apparent, and several pilots stated they so understood, that the above practice was designed to avoid grounding an aircraft on which a no go item was inoperative or which was unairworthy.

The record also indicates that Air East falsified records to indicate that required inspections and certifications of airworthiness had been accomplished by a qualified inspector, when in fact they had not.[112]

We cannot agree with respondents that section 91.165 of the FAR does not require entry of discrepancies in the aircraft log book. Rather, defects can only be properly repaired and aricraft released to service, as prescribed by that provision, if entries are made in the log book as each discrepancy occurs and then signed off as each such item

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[111] Many of these arrivals and departures were made in IFR conditions.

[112] Evidence thereof is discussed hereinabove with respect to the charges against the repair station.

is corrected. In other words, the above regulatory provision was designed to avert the very practice prepetrated by Air East—*viz.*, the operation of aircraft with required equipment inoperative.

Respondents have in considerable detail attempted to undermine the testimony and evidence of record relied on by the law judge in affirming Charge 8. We are unconvniced by their characterization of the record, however, and therefore find that the weight of the evidence sustains the conclusions of the law judge.

With respect to Charge 10, it is undisputed that Air East flight time records were maintained on a time-in-service basis (wheels-off to wheels-on) rather than on a pilot flight-time basis, as that term is defined in section 1.1 of the FAR (block-to-block). Nevertheless, we agree with the law judge that this violation is basically technical in nature, inasmuch as the Air East practice was set forth in the company manual which in turn was subjected to review by the FAA before being put into effect.

In regard to Charges 12, 13, 14 and 15, numerous Air East pilots testified that they were not given flight-check rides required under Part 135, even though records filed with the FAA by Air East indicated such checks had been accomplished. Furthermore, the single designated check pilot (Luther), who alone (apart from an FAA representative) was authorized to administer such checks, testified that many of the checks entered in the records by him were either never given or given at a later date and then back-dated in the records. He further stated that although Respondent McKinney never directly instructed him to falsify the records, he understood that he was expected to do so in order to keep the pilots flying. We agree with the law judge that such an inference is inescapable and that Respondent McKinney must have been aware of what was going on.

We further find that Charge 16—failure to provide aircraft and facilities to allow Air East pilots to remain proficient—is established by the same evidence discussed immediately above, although said charge is basically redundant to Charges 12 through 15.

In support of Charge 17, the law judge cited an occasion on which Air East failed to report to the FAA an incident involving the feathering of a propeller in flight due to loss of oil pressure.[113] Although the pilot-in-command did not state precisely that he informed Respondent Reddecliff of the feathering when the matter was discussed by telephone, he did testify that "I told him what we had happened [sic]." It is difficult to conceive how a description of the incident could have omitted the feathering. Nevertheless, even if Reddecliff were not advised of the feathering during the phone call, he specifically advised the pilot not to make an entry in the log book. Thus, if Air East remained unaware of the feathering, it was only because of their improper practice of not logging discrepancies, which obviously is not a valid defense to the violation listed under Charge 17.

Finally, with respect to Charge 19, there is in the record some evidence of harassment, intimidation, and threats utilized by Air East management to influence pilots to comply with some of the improper and unsafe practices described hereinabove.[114] One pilot, for example, testified that "any time that you did not go by these unwritten policies, you'd be threatened with being back as first officer" (Tr. 1923) and that he was called into the office and harassed, embarrassed, and "told how they wanted things

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[113] As respondents point out in their brief, the law judge mistakenly referred to the date of this incident as February 20, 1974, whereas the actual date was December 7, 1973.

[114] Other testimony, not directly pertinent to this charge, described hard feelings on the part of management, sometimes carried to extremes, when pilots quit or sought employment elsewhere.

done" (Tr. 1924). Another pilot interpreted an accusation made against him by Respondent McKinney as "a threat so you would do it the way they wanted you to do it" (Tr. 1835). Although no regulatory violation was cited in connection with this charge, we agree with the law judge that it reflects on the insistence of Air East management that the pilots accept irregular practices without dispute.

In summing up the charges against Air East, what emerges from the record is the profile of a company which, through its management, initiated and fostered practices that are in violation of numerous provisions of the FAR and that have compromised safety in every phase of the company's operational and maintenance functions. Air East has thereby demonstrated that it does not possess the care, judgment, and responsibility required of the holder of an air taxi/commercial operator certificate and that revocation thereof is warranted.

Point XVII—The sanctions imposed on Air East were entirely inappropriate.

Respondents maintain that the continuing surveillance of the FAA, GADO office, as well as the SWAP team inspections conducted in 1973, have uncovered only minor discrepancies and demonstrate that Air East is a well-qualified operator. The results of these inspections, however, cannot offset the overwhelming weight of the evidence developed in this proceeding. Moreover, it is apparent that the failure of these inspections to uncover the violations established herein is in large measure attributable to the record falsifications designed to assure that such violations would not be detected.[115]

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[115] In any event, the capability of GADO surveillance, and even SWAP team inspections, to detect the types of violations committed by Air East is open to serious question.

Appendix C.

For the reasons spelled out hereinabove in this opinion, it is the Board's ultimate conclusion that the findings of Judge Woodlock, with respect to each of the six respondents, are supported by a preponderance of the substantial, reliable, and probative evidence[116] and that each of the respondents has thereby demonstrated lack of qualifications to hold his or its certificate. It therefore follows, in imposing sanctions consistent with the statutory guidelines of air safety and the public interest, that revocation of those certificates is appropriate and indeed required.[117]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal be and it hereby is denied;

2. The initial decision, as modified herein, be and it hereby is affirmed; and

3. The Administrator's emergency orders revoking the certificates of respondents, as modified herein and by the law judge, be and they hereby are affirmed.

MCADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order, REED, Chairman, not participating.
(SEAL)

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[116] The single charge found established by the law judge, which we have dismissed, is that involving the allegation that Respondent Tallent did not receive an instrument flight check required by section 135.131 of the FAR.

[117] In view of our disposition of the case on the basis set forth above, we find it unnecessary to reach the issues raised by the Administrator's appeal or to rule on respondents' motion to dismiss that appeal. Our ruling in this regard should be taken as neither an adoption or rejection of the law judge's findings disputed by the Administrator's appeal.

APPENDIX D.

Opinion of Administrative Law Judge Woodlock.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

ALEXANDER P. BUTTERFIELD, Administrator
Federal Aviation Administration

vs.

AIR EAST, INC., d/b/a ALLEGHENY COMMUTER,
Docket SE-2509

JAMES AVERY TALLENT, Docket SE-2511

JEFFREY H. WILKINSON, Docket SE-2512

THOMAS REDDECLIFF, Docket SE 2513

CHARLES ALLAN MCKINNEY, Docket SE-2519

AIR EAST, INC. (Repair Station), Docket SE-2522

SERVICE: Air East, Inc., d/b/a Allegheny Commuter,
Respondent
Johnstown-Cambria County Airport
Johnstown, Pennsylvania 15904

James Avery Tallent, Respondent
431 Luzerne Street
Johnstown, Pennsylvania 15904

Note: This is a copy of the oral initial decision rendered at the conclusion of the hearing in this proceeding, April 26, 1974, by Administrative Law Judge Fred L. Woodlock.

Appendix D.

SERVICE: (Continued)

Jeffrey H. Wilkinson, Respondent
117 Melvin Street
Johnstown, Pennsylvania 15904

Thomas Reddecliff, Respondent
c/o Air East, Inc.
Johnstown-Cambria County Airport
Johnstown, Pennsylvania 15904

Charles Allan McKinney, Respondent
431 Bellmont Street
Johnstown, Pennsylvania 15904

Air East, Inc. (Repair Station), Respondent
Johnstown-Cambria County Airport
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and

Appendix D.

Robert W. Katz, Esq.
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

ORAL INITIAL DECISION OF JUDGE FRED L. WOODLOCK

JUDGE WOODLOCK: As I am required to do in emergency actions, I will now give my oral decision in each of the matters which we have brought to conclusion.

The various respondents have each and all appealed from the emergency order of revocation issued by Administrator through a duly designated member of the staff on March 7, 1974.

I'll not set forth the charges at this point but I do intend to discuss each one separately during the course of my decision and think that will be sufficient to apprise anyone who has enough interest to read it, what the charges are and what the various defenses are.

At the outset, the respondent has filed proposed findings and conclusions and I will address some of them at this time, and others during the course of discussion on the various charges subsequently.

Now, the first proposal is that the complaint lacks a concise and complete statement of the facts relied upon which it is claimed was not improved by the bill of particulars submitted by the Administrator and that therefore the complaint as supplemented by the bill of particulars does not comply with the requirements of Section 421.4(d) of Title 14, CFR and should therefore be dismissed.

To avoid any confusion, these various findings and conclusions are proposed in connection with each respondent's defense and what I say here applies to each one of them.

I'll discuss each of the charges separately, of course, but as to the general proposed findings and conclusion, I can discuss them as one.

I find that the complaint as supplemented by the bill of particulars while concededly not a masterpiece of legal drafting is sufficient to advise the respondents of the charges against them and to meet them.

The second proposed finding: that the Administrator's complaint lacks a recitation of the pleaded facts upon which the Administrator relies in support of the contention that the respondents lack qualification, which is not improved by the bill of particulars, and the conclusion which follows therefrom that the complaints should be dismissed as not complying with the performance of section 421.23, Title 14, CFR, and should therefore be dismissed, is refused as is proposed finding 3 with its accompanying conclusion that the complaint and evidence are vague and consist of unspecific general allegations of violations on the parts of the several respondents which have made it impossible for respondents to present a defense that therefore he is denied—they have been denied their Constitutional right to due process.

In connection with that latter proposed finding and conclusion, I do not, of course, have authority to declare a statute of the United States unconstitutional.

The proposed finding that the Administrator has had an adequate opportunity to discover violations occurring prior to 7 September 1973, within six months of their alleged occurrence has been previously disposed of when a similar motion based upon similar statements was made at the beginning of the hearing.

The proposed finding that the respondent has not committed or the respondents have not committed wilfull violations of any regulation or wilfully disobeyed any order of the Administrator, nor exhibited an unwillingness to act in accordance with applicable regulations is not made.

I think those are the proposed findings and conclusions which relate broadly to the various complaints and the

others are addressed specifically to the individual charges in each complaint.

I turn now to the order issued to Air East, Inc. d/b/a, Allegheny Commuter.

Charge number 1, Air East, Inc., d/b/a Allegheny Commuter is now and at all times mentioned herein, was the holder of Air Taxi Commercial Operator Certificate No. 14-EA-69 issued August 21, 1969, pursuant to part 135 of the Federal Aviation Regulations (hereinafter referred to as the FAR's.)

This charge was admitted.

Charge 2, Air East, Inc., as a matter of policy, on numerous occasions, operated, caused or permitted to be operated aircraft in operation under part 135 of the Federal Aviation Regulations, when such aircraft either exceeded the maximum certificated takeoff weight and/or were outside the approved center of gravity limits in violation of Sections 91.9 and 91.3(a) of the FAR's and Section 610(a) (4) and (5) of the Federal Aviation Act of 1958, as amended (hereinafter referred to as the Act) on each such occasion.

There were bills of particulars, of course, made to all of these, but I'll not refer to the bills in my discussion because I'm relying, I believe, and depend only on the evidence which was admitted and not on any of the evidence which was proffered—made as an offer of proof.

Donald Wright, a commercial pilot, was a First Officer with the respondent from October, 1972, to December, 1972, and thereafter a Captain to March, 1974.

He flew air mail schedule for ten weeks and testified that when mail was loaded or offloaded at each stop in the schedule, a new weight and balance sheet and center of gravity computation would be required.

According to his testimony, Allan McKinney told him to complete the forms in the air if time and schedule interfered.

His air mail run from June 18, 1973, to July 20, 1973, was for a particular five-week period.

Shoemaker, another former pilot with Air East said that in twenty-three flights as First Officer with the mail, he never had an opportunity to calculate the center of gravity.

Robin Mangold, the holder of an air transport pilot certificate, was with the respondent from April 31, 1973, to September 1, 1973, as a First Officer.

In that capacity he made out the load manifest and the Captain, he stated, would look at it and sign it.

If, he testified, there were enough passengers to constitute a problem with the gross weight for takeoff he would insert three hundred pounds of baggage and eight hundred pounds of fuel in the appropriate places on the form.

On August 13th, 1973, he was First Officer to one Captain Graff on Flight 319 which had a full load of people and considerable cargo, although he testified he did not know how much.

While the right engine was running the aircraft came very close to teetering on its tail with the door still open. At the time, he said there were passengers still outside.

The Captain, in an effort to keep the aircraft from going on its tail, started the left engine and Mangold stated he lost the tickets in an effort to keep the passenger door above the pavement, although in that respect he was unsuccessful, and also to keep it from landing on its tail.

The load manifest prepared on this occasion showed that the weight and balance and center of gravity were within legal limits although he testified he was sure they were not.

After he had been with the company for some four months, Captain Wilkinson told him to increase the take-

off weight to 10,800 which was 400 pounds above the legal limit.

He further describes the difficulty he had with Allan McKinney after he returned to Johnstown, and found him quite disturbed that the tickets had been lost, and unsympathetic to his explanation.

John W. Trotter, holder of an air transport pilot certificate, certified flight instructor with considerable experience as an instructor in ROTC program, was with Air East from July, 1970, to December, 1972.

He was a First Officer up to May, 1971, and thereafter Captain.

One of the subjects he taught to pilots at Air East during the term of his employment was weight and balance computation.

He, too, was assigned to the mail run and described about ten takeoffs and landings required. Mail was loaded and offloaded and the weight and center of gravity could change on each occasion.

New computations were required therefore, each time.

During the first week of August, 1972, he stated that Allan McKinney told him not to worry about weight and balance on load manifests but to stick to the published schedule and complete forms during the run.

He was on the mail run one week at a time and did that each time during his tour of duty.

The procedure he followed was to determine when the basic operating weight plus the fuel on board plus actual weight of cargo and passengers, on passenger runs, exceeding 10,455 pounds, he could use the "fudge factor," so-called by Allan McKinney when he authorized such use.

He even testified he complained one time when told that the weight was close to 11,000 pounds and was informed by Allan McKinney the company used what fuel was needed and then used the specific figures on the weight and balance form to make it appear legal.

If more fuel were needed it could be put on but he was instructed not to go over 10,800 pounds total gross weight, but the form would show only 804 pounds of fuel and 200 to 300 pounds of cargo, so the figures would be legal.

Trotter brought discrepancies in the manifest to Allan McKinney and Tallent's attention, warning them that there was a possibility that the FAA might discover this procedure.

He used this procedure from his first two or three months of employment and during his entire stay with Air East.

Wayne Dewitt, an air transport pilot certificate holder, who now has some 5500 hours of flight time also used the "fudge factor" when he had fifteen people on board, and he testified that 90 percent of the time he had fifteen people on board, especially while going to Altoona.

He also testified that Allan McKinney told him to use between 800 and 900 pounds of fuel and 350 pounds of freight to make the forms come out properly.

Robert Underwood, who impressed me with his honesty and forthrightness, the holder of an air transport pilot certificate with some 900 hours as a certified flight instructor, was a co-pilot with Air East for two weeks and Captain for the rest of the term of his employment.

He volunteered to be the permanent mail pilot and testified that to receive full pay for the mail runs the company had to be on time 96 percent of the time but could refuse mail for more fuel and would get paid full amount as if the full load had been carried.

He testified that he was never overweight on the mail run but he was never certain of the proper location of the center of gravity.

He did not always prepare the forms prior to takeoff.

Montague testified to the same effect, and that he was told to do so by Allan McKinney and J. Tallent. He

bumped passengers on one occasion but was reprimanded by the agent at the time and was spoken to later by both Allan McKinney and J. Tallent about the practice.

On cross-examination he testified that he falsified the weight and balance anytime that the aircraft exceeded maximum gross weight and not only when there were fifteen passengers aboard.

During the period he was First Officer he always told the captain that he did this and recalled having told J. Tallent. This, of course, would have been done, as he testified was done, under IFR conditions where the need for fuel was greater.

Gerald Knouff, the holder of an air transport pilot certificate, who is still employed by Air East, testified that he was on the flight with Captain Brannan on January 6, 1974 which crashed after deparature from Pittsburgh and during the course, apparently, of its landing at Johnstown, the evidence to me isn't clear where the crash occurred—he was taken through the information in the logbooks indicating the amounts of fuel purchased during the course of that schedule and agreed if they had been added properly the aircraft at the time of the takeoff from Pittsburgh, would have had in excess of 1200 pounds of fuel on board.

He himself prepared the load manifest before takeoff on flight 617, which is the one that crashed, and that form indicated that there were fourteen passengers on board, and the total weight was 10,793 pounds, with 804 pounds of fuel. This form was left with the ticket agent at the counter in the terminal building, and before their departure another passenger boarded who was not shown on the manifest.

He computed another manifest but this was kept in the aircraft and showed fifteen passengers with, of course, three children, two teenage girls and some women, and that there were 800 pounds of fuel on board.

The form given to Collins during the course of the investigation of the crash by Allan McKinney was not, according to Gerald Knouff, the one he had prepared, although his initials appeared thereon.

Collins had been unable to find a form at the crash site and what was represented as a copy of that prepared by Knouff and left at Pittsburgh, had been furnished him by Allan McKinney. That is the one that Knouff denied completing prior to takeoff. The inference is most unfavorable to the respondents and particularly to Allan McKinney.

B. F. McKinney testified that National Transportation Safety Board in a report which he identified as a final report, but which clearly is not a final report, indicated that the amount of fuel necessary to fly from Pittsburgh to Johnstown with a 45 minute holding period sufficient to go to an alternate was 750 pounds. He neglected, or overlooked, referring to instructions given to the pilots at Air East to purchase as much fuel at Pittsburgh as they could during the energy crisis. I think I can take notice of the fact that the energy crisis was critical, which is a somewhat redundant expression, but nevertheless it was critical on January 6, 1974. There is, therefore, sufficient evidence from Knouff to indicate how much fuel was on board.

The finding by the Board, also testified to by one of the respondents, that some 790 odd pounds or less than 800 pounds of fuel were on board at the time of the crash is worthy of no belief at all because at that time the only information the Board had was that furnished by them by Allan McKinney, that showed 800 pounds of fuel were on board at the time of departure from Pittsburgh.

I think it is a matter—it is an obvious conclusion that in arriving at their determination as to amount of fuel at the time of the crash, that figure was used, there can

be no other way to determine how much fuel was on board an aircraft after it crashed.

Paul Saythe also testified still on the second charge under Air East—he was with the company for ten months from May 7, 1973, through March 15, 1974. He also holds an air transport pilot certificate and was hired by Air East as a Captain.

He was told the same thing by J. Tallent concerning the fuel to show on board, and the baggage, when fifteen passengers were carried.

Silas Fuller, also an air transport pilot certificate holder, was a First Officer with Air East for some five months, December, 1972, to May, 1973. He also testified to the practice and his custom of showing the fuel and gross weight of the aircraft.

He was so instructed, he testified, by both Allan McKinney and J. Tallent, and testified also that he did so quite often, and particularly when he flew with Captain Wilkinson in 1973, February.

He stated that it happened so frequently it was a daily occurence, according to him,—and this should be apparent in each of these instances,—it was impossible to determine the center of gravity prior to takeoff since computations hadn't been completed.

One of the respondents, I believe it was Tallent, testified that he could complete the load manifest on the air mail in two or three minutes at the most and that there was no difficulty in maintaining schedule, so there was no need to fill out forms after takeoff.

However, Luther also the holder of an air transport pilot certificate stated that with the ten minutes on the ground at the stops there was not enough time to do the paperwork, since it was necessary for both crew members to handle loading and unloading where considerable mail was put on.

He did state that at Harrisburg twenty minutes was the scheduled stop and that this was not enough.

He did deny that anybody in the company told him to use this system, but stated that, apparently, it was his own idea in an effort to maintain the schedule.

David Dunn testified to the same effect.

All of these flights which I have been discussing were taken in a Beech 99 or Beech 99A where the apparent gross weight given is applicable.

The denials by the respondent on the fact of testimony of these and other employees, both former and present, of Air East, is unworthy of belief.

There is a problem, however, in connection with the charge of making a finding that the aircraft exceeded the maximum certificated takeoff weight. There are some indications, particularly, the one where First Officer Knouff flew with Graff on January 6, 1974, that the aircraft was clearly overweight.

However, it is obvious that the aircraft center of gravity had not been computed and therefore was not known prior to takeoff.

Aircraft clearly operated without compliance with the operating certificate in violation of Section 91.31A of the FAR's and such operation was in violation of section 91.9 of the regulations and the deliberate nature of such method of operations compels a finding that the company was reckless and such operation did endanger lives and property of others.

Some consideration should be given at the outset, not particularly in connection with this charge two, but in connection with the testimony of the various witnesses and their credibility or lack of credibility.

It has been suggested that various pilots testifying during the course of the Administrator's case in chief were all parties to a conspiracy directed towards removing the

McKinneys from control of Air East and inserting somebody else.

There is no evidence at all to support such insinuations.

Much also was made of the fact that during the course of the various depositions which were obtained from witnesses by the Administrator, each witness was told that he would not get immunity by testifying but his cooperation would be taken into consideration by the Administrator in determining any sanction imposed on him or any enforcement action taken against him, and that therefore each witness came in and exposed himself as having committed these various violations on the strength of a representation that he would be released from any obligation in connection with them.

It is an interesting theory but not a very realistic one. It implies that the Federal Aviation Administration conspired with these various witnesses and encouraged them to falsify their testimony so that charges could be made against Air East and the other respondents.

That is the only extension of such a defense I can reach and I find the argument without any merit whatsoever.

These witnesses, many of them, are holders of air transport pilot certificates. They were not novices. They were not new pilots in the sense that they had just obtained their authority to solo, but many of them had had considerable experience, more so than some of the officers of Air East.

I note particularly that Allan McKinney was the holder of only a commercial pilot certificate. He was, without authority, checking other pilots with the company who had higher ratings than he did.

If there was resentment on the part of the other pilots toward Allan McKinney for this assumption of authority, it is understandable.

I, also have cause to comment on the deposition which the respondents offered into evidence from Alexander, a

deposition which was taken by the Administrator but which was not used nor was the witness called to testify.

This witness stated that it was known, I believe, that Allan McKinney lacked judgment and the technical capacity to obtain an air transport pilot certificate and in fact had failed to obtain one when he had attempted to do so.

Turning now to charge 3: when conducting the operations described in paragraph 2, Air East, Inc., directed or permitted its flight personnel to insert false and fictitious computations on the required load manifests so that they falsely showed that such aircraft did not exceed the approved maximum takeoff weight and/or that the loading fell within the center of gravity limits and that by such action Air East, Inc., violated Section 135.43(c) of the FAR's on each such occasion.

The charge leveled in paragraph 2 is of a violation of Part 91 of the regulations. Paragraph 3 extends that to a violation of part 135 of the regulations.

There may have been occasions under charge 2 where the operation was under part 91, and of course, if there were, they cannot sustain or support a violation under charge 3.

I note that Gerald Knouff testified that one of his trips was a part 91 trip and, of course, it could not be used to support the charge 3.

However, Captain Trotter, Captain David Dunn, Dewitt, Fuller, Knouff, and Montague all testified as indicated under charge 2 in a 135 operation.

It is true the company policy manual required load manifests to be completed prior to takeoff on every flight, and the various witnesses for the respondent denied any knowledge of this practice.

The testimony is otherwise and I find the charge supported by the evidence. The argument that Section 135.43 (c) does not require a load manifest to be completed prior to takeoff may be technically—it may technically have some

merit but practically is without any. The heading of that section of the regulation is "record keeping requirements," and in great part it does deal with record keeping requirements. Subparagraph C under that section goes beyond record keeping and states that each certificate holder shall prepare or cause to be prepared a load manifest containing the following information concerning the loading of aircraft at takeoff time. That section was violated.

The section charged, of course, does not state—nor does the section under the charge which is the same one—does not state the regulation as it reads and it requires only that the manifest be prepared containing certain information.

If the manifest was not prepared containing the information the regulation was violated.

It is clear, although again the absence of appropriate words is to be criticized, the regulation does not say that the manifest or information will be completed before takeoff, but only that the information be shown on a load manifest, the information which existed at takeoff. There is, of course, no meaning to the regulation if it is interpreted as permitting completion of the form after takeoff, showing what the condition was at the time of takeoff. Pilots need information concerning the center of gravity before takeoff, not after, and as respondent points out, the policy manual itself required that the load manifest be completed prior to takeoff.

Concerning charge 4: Air East, Inc., on numerous occasions failed to prepare or cause to be prepared as required, at takeoff time, and to retain, load manifests for operations involving the carriage of mail by aircraft under contract with the U. S. Postal Service. Air East violated section 135.43(c) of FAR's on each such occasion.

Testimony on this charge has been given by Trotter, William Shoemaker, Wright, Underwood, and Merle Luther.

Much of the testimony is the same as that established in charge 3 and it is found established by the greater weight of the evidence, notwithstanding the blanket denial of the respondents individually that such in fact was the practice, and that if it was, they were ignorant of it.

Charge 5, Air East, Inc.: on numerous occasions, knowingly encouraged, or permitted, or instructed and required its pilots, when conducting operations under part 91 and 135, to use instrument approach procedures at Johnstown-Cambria County, and Martinsburg-Blair County (Altoona), Pennsylvania Airports, which had not been approved by the Federal Aviation Administration in FAR part 97. By each of such operation, Air East, Inc., violated sections 91.116(a) and 91.9 of the FAR's and section 610(a) (5) of the Act.

There is considerable evidence to support the charge in the record.

Shoemaker was a holder of an ATP certificate, was instructed to use other than published approach at Johnstown by Allan McKinney and his father, B. F. McKinney. He was told this within the first month of his employment. This unauthorized and unpublished procedure was drawn for him by Allan McKinney.

Dewitt specifically described an unauthorized approach into Johnstown by Allan McKinney on February 1, 1973, and testified that Allan McKinney showed him a 33 approach to Johnstown which was not published and it should be pointed out Louis Petersen from the FAA Flight procedures and air space section stated that there was no localizer approach to runway 33 to Johnstown before June of 1973. There was considerable questioning on this matter but that's the only reliable testimony that establishes the date when the localizer approach was legal.

Dewitt, returning to his testimony, was told by Allan McKinney that he could not use this approach for three

or four months and he testified that he never did, in fact, use it. He also testified that he was with Allan McKinney when he used it in a 135 operation under instrument conditions.

He was also shown an unpublished approach into Altoona by Tallent on March 7, 1973, with fourteen passengers on board at this time. He again, when he described the procedure used by Tallent, it did not conform to any legal approach.

Robin Mangold, also the holder of an air transport pilot certificate, while attending ground school given by Air East, was shown deviations which were permitted at Johnstown, deviations, that is, from the published and legal approaches.

He described his flight with Allan McKinney on May 20, 1973, when he shot a zero-zero approach at Johnstown.

Trotter told of Allan McKinney's having instructed him to use "company approach" to runway 33, Johnstown, when it was not a published approach. He drew a diagram of such approach and that's Administrator's Exhibit A-61.

This was after Trotter checked out as a Captain, which was on May 7, 1971, and he himself used this procedure in IFR conditions with paying passengers aboard and did so from July of 1970 to December of 1972.

He also described Tallent as having given him an unauthorized procedure at Altoona after September 15, 1971, and stated that he also used that procedure. He used it only a couple of times as stated, but did not like it and stopped using it.

Fuller testified that he saw several Captains use other than published approaches to Johnstown. He was with Wilkinson when he used it under IFR conditions in a 135 operation in February, 1973.

He described Tallent as having used it in January, 1973, and related specifically one instance, although not the date of such instance, when Tallent asked him to look up the

3-3 approach, and he couldn't find one in the charts in the aircraft. His description of Tallent's activities thereafter are graphic and he described the laughter and statement that there wasn't one but it was just one the company made up and that only certain pilots were allowed to use it.

The respondents testified that they knew of no illegal approach procedure used at Johnstown. The only explanation they could offer was that the pilots without much experience were apt to confuse a certain approach to runway 3-3 which has been initiated in compliance with published approaches with the actual legal approach.

Review of the qualifications of the various pilots who testified otherwise reflects, or would reflect if this testimony of the respondents is to be believed, seriously on the method of qualifying pilots for air transport pilot certificates, because many of those testified to the use of unpublished approaches. Their qualifications certainly are sufficient to have enabled them to determine the difference between a legal approach and what they unanimously called an illegal 3-3 approach without any difficulty.

In this connection there is no indication on the record that any of the witnesses called by the Adminstrator coordinated their story or consulted with each other on practices or procedures. In fact, there is definite evidence to the contrary.

Pertaining to charge 6: Air East, on numerous occasions, knowingly encouraged, or permitted, or instructed and required its pilots, when conducting operations under Parts 91 and 135 of the FAR's to use altitude and/or visibility minimums at the airports described in paragraph 5 which were below those prescribed in the FAA approved instrument approach procedures as described in FAR part 97. Air East, Inc., conducted each such operation in violation of sections 91.116(a) and (b); 91.117(a) and (b); and 91.9 of the FAR's and section 610(a)(5) of the Act.

The record is full of testimony relating to this charge.

Trotter again testified that he was told after May of 1971 to use company minimums, and that he did so under IFR conditions with paying passengers.

He was also told by Allan McKinney and Tallent to use IFR minimums at Altoona lower than those published.

Shoemaker, who although not fitting into respondent Tallent's image of a pilot, was the holder of an air transport pilot certificate and testified that he actually went into Johnstown in actual IFR conditions after the flight service station was closed, between April 27, 1970, and April 19, 1973, knowing that to accomplish a landing it was necessary to go below published minimums. He describes Allan McKinney as having done so when he was Captain.

He also testified that Allan McKinney frequently observed approaches made by other pilots to make sure that they were done as he wanted it, and that would include descending below published minimums.

Dewitt testified as to going into Johnstown below the published minimums.

Mangold had what obviously was, to him, a frightening experience on May 20, 1973, when Allan McKinney was Captain and shot an approach into Johnstown under zero-zero conditions.

He supports his recollection by a log entry indicating that weather was down to the minimums but of course he did not put into that log entry that the weather was below minimums.

He testified that he never saw anything until he landed, after which he could see perhaps one runway centerline mark ahead, a distance of perhaps 200 feet, and that he did not see the ground until after landing. It was a 135 operation from Pittsburgh to Johnstown.

The witness described an approach into Johnstown with Allan McKinney on February 20, 1973, at which time they

descended to below the minimum descent altitude authorized. He could not, he stated, have kept ground contact if they remained at minimum descent altitude. Weather report for February 20, 1973, Johnstown, which is Exhibit A-5, indicates an estimated ceiling of 12,000 feet overcast, visibility ten miles in a special report for 0200 and 0300.

This was offered by the respondents as destroying the credibility of Dewitt on this particular occasion but in closer examination of this refutation, it indicates that the 19th of February was a legal holiday in Pennsylvania, so testified to by Dewitt—the 19th of February was a legal holiday, and the evidence reflects that no mail run was instituted on that date. A mail run that was instituted on the 19th of February would have landed at Johnstown at 0230 on schedule. If the run had not been operated, then of course, there was no landing at 0200 or 0300.

Dewitt corrected himself and, as did other pilots, referred to the confusion where a flight originated on one day and went through midnight into the next day and the problem of separating the days. As he explained it, his explanation was credible. The flight that occurred on said date took off on the 20th of February and the landing was the morning of the 21 February 1973.

Another aspect of this defense is the weather report itself on February 20th at 0200. If there was no mail flight, what was the weather report, ostensibly taken by Warren Krise, doing in the record and, secondly if the ceiling was 12,000 feet, why was Krise out there taking a reading on it?

He testified that the only times that he took weather observations were when instrument conditions prevailed.

Again, the inferences do not favor the respondent's explanation.

Montague testified to the illegal approach at Johnstown.

Fuller did also. This is an example of the problem in establishing such charges as were made against the respondent.

Counsel for the respondent argues and properly so, that it was difficult to defend charges which were not specific because then it would resolve into an issue of credibility. Here is a case where specific dates were cited and we still come down to an issue of credibility. Each respondent who was operating the aircraft on these occasions denies there was any violation of procedures.

Sayther also testified on this practice, as did Fuller and also Luther.

Luther, whose character everybody attested to as excellent, stated that when he was hired by B. F. McKinney, B. F. McKinney told him that approaches at Johnstown would be at Minimum descent altitude, 200 feet above airport elevation and that he did this with passengers while still in IFR conditions.

Before the schedule was commenced to Altoona, Allan McKinney advised him he could fly to less than published minimums and he did so in actual IFR conditions.

Again, Luther is the holder of an ATR and the only authorized check pilot with Air East, and again I refer to the deposition of Alexander, where it indicates that Allan McKinney attempted to become check pilot but he was denied that honor.

Marzick testified that on February 4, 1974—this incidentally is a month after the accident,—he was flying with a Captain whose name I don't have at the moment and was calling out altitudes as they descended and did so while they were still at minimum descent altitude, while they were still in solid IFR, in clouds, and that he was unable to see the ground. This appears at page 3017 of the transcript.

Captain Tallent describes the appropriate procedure for making low approaches to fields and while it is consistent with their defense, it is not consistent with what the company policy manual says is the proper procedure nor which other pilots who testified said was the better procedure,

and that is that the co-pilot remain outside the cockpit and the Captain inside until the co-pilot states that the runway was assured or the runway was in sight and landing was assured.

There was no testimony on the dangers of a Captain on instrument at low altitude who attempts to control the aircraft by reference to instruments and at the same time makes efforts to make contact visual, that is, with a runway or runway environment.

Captain Tallent's explanation of the term company minimums again shows ingenuity if nothing else, and in describing approach at Johnstown, where the minimum descent altitude permitted by the regulation was 2,940 feet, he stated that if the pilot was required to maintain that until he picked up the runway, he'd be too high to handle it.

The explanation is incredible to me. It frankly does not make sense. He indicates an abysmal ignorance of the purpose of the minimum descent altitudes.

Charges contained in charge 6, violation of section 91.116(a) and (b); 91.117(a) and (b); and 91.9 of the FAR's and section 610(a)(5) of the Act are established.

MR. GERAGHTY: Your Honor, could I—are we back on the record, sir?

JUDGE WOODLOCK: Not yet, but what do you want?

MR. GERAGHTY: I would like to speak to you when we are back on the record.

JUDGE WOODLOCK: All right.

MR. GERAGHTY: Sir, I may have misunderstood your findings as you were going along, but I'm referring to specifically charge 5, and I may not have heard you, if you said something, Your Honor, I apologize for not hearing it, but I believe you said there was considerable evidence to

support the charge in the record, but I do not believe you made a specific finding after you made that statement, sir, because I have no notes to it. I may be in error and if I am, I apologize.

JUDGE WOODLOCK: If you are, the record is going to have two findings on it.

MR. GERAGHTY: Yes, sir.
I don't believe there were any findings stated—

JUDGE WOODLOCK: Because I'm about to make such a finding, and I thank you if I failed to do so.

I now do so and find that violations of section 91.116(a) and 91.9 of the FAR's and section 610(a)(5) of the Act as charged in charge 5 are established.

MR. GERAGHTY: Thank you, sir.

JUDGE WOODLOCK: Thank you.

Turning to charge 7: Air East, Inc., operated or caused or permitted to be operated under part 135, numerous flight operations into and out of the Johnstown-Cambria Airport in weather conditions less than the VFR minimums when the Johnstown flight service station was not in operation and without the pilots being given weather reports from an accredited weather observer, in violation of section 135.65, 135.111, 91.116(c), 91.9 of the FAR's and section 610(a)(5) of the Act on each such occasion.

The character of the hearing was established in some ways by the testimony of Warren Krise, a man who the evidence shows is worthy of absolutely no belief whatsoever.

He has been a certified weather observer since June of 1972; and has been with Air East since April of 1970.

He testified that he made observations every night since June of 1972, when IFR conditions existed at Johnstown Airport. June of 1972, of course, is the time Air East obtained the mail contract from the Post Office.

Appendix D.

The flight service station operated from 0700 to 2300 hours daily.

If, he stated, it was needed, a phrase which has occurred frequently throughout this proceeding, he would go to the airport at 0100 and stay until 0400 hours and then return home.

He testified then on May 22 to the 25th, of 1973, he was a patient in the Conemaugh Valley Memorial Hospital, and that patients in such unit were not required to remain overnight, and that he did not remain overnight during those dates.

Exhibit A-5 shows the weather observations, he says, he made on those nights, and that he checked the barometric pressure himself when he took the weather reading.

To thoroughly discredit this man's testimony we have testimony of various employees of the Conemaugh Valley Hospital who stated very definitely that self-care patients are not permitted to leave the hospital after hours except with their doctors' permission, and that if they do so, they were required to check out and check in. They could not remain overnight if they left the hospital and the one occasion where the testimony indicates, according to the medical records at the hospital, that Krise did, in fact, leave the hospital during that period, he signed out on May 26 and signed back in again at 8:30 p.m.

The two nurses on duty during that period, Adeli Ober and Dorothy Rok, were completely convincing in their testimony that they checked the rooms during the night and that Krise, whom they admitted they did not know personally, but whose bed was occupied by the man they knew as Krise at that time, was there at all times during those nights.

It was suggested that Krise might have left by another exit. Why he should do so, if it was permitted without any difficulty as he testified, was not made clear.

Appendix D.

The picture was envisioned of Krise sneaking in and out of the hospital, out to the airport, taking his weather readings and sneaking back in again so that the nurses on duty wouldn't see him.

The pattern that Krise established in the defense has, in my opinion, been continued by the other respondents.

Pilots reported that during their term of employment with Air East they never once saw Krise at the airport between the hours of 1:00 a. m. and 4:00 a. m., while they were on the mail run, even with instrument conditions prevailing. The evidence is so clear and undisputed on this matter it doesn't even justify comment except by reference to testimony of mechanics on duty during the period when Krise was charged with the responsibility of making weather observations. Orlowsky testified that on occasion he received calls from pilots on the night mail run and that he, himself, would read the instruments and that he never once saw Krise at the airport during the hours that Krise said he was there. He did, however, see him in the mornings as he went to the parts room in the hangar where he was observed taking readings and filling out the weather forms for the previous night.

Cerwensky would read the wind velocity and wind direction and estimate the ceiling and furnish this type of inmation to the pilots when they called.

Samuel Panarella also testified that he worked nights as a mechanic from June 8, 1972, to November 20, 1973, and that he got calls from the pilots on the mail run, and would call either Agnello or Reddecliff for weather information. If neither of these gentlemen were available, he, Panarella, would look out the window to get the best weather observation he could. He stated he never got the weather from Krise and never saw him from 0100 to 0400 hours at Johnstown Airport. He would, however, and did see him in the morning at about 9:30, taking weather observations.

Recital of this evidence is sufficient to dispose of the matter without any editorial comments on my part.

It is found that the respondent Air East violated section 135.65, 135.111, 91.116(c) of the FAR's, and section 610(a) (5) of the Act on each such occasion.

I make no finding on the charge of violation of section 91.9 on the part of Air East because I don't see how it could have been operating aircraft as that regulation provides by this activity, although the various pilots were, of course, doing so.

I did not refer in connection with this same charge to the practice of the flight schedule for a 0650 departure from Johnstown, which obviously was prior to the opening of the flight service station. Apart from questioning the determination of management of scheduling a departure at 0650 prior to the time when official weather could be obtained, the testimony also shows that on many occasions pilots took off without official weather from the FSS on this flight under instrument conditions. When they did so, they made their own determination of the weather. There were, of course, other occasions, as one pilot testified, where personnel were observed in the flight service station and since they were the pilots would remain to avoid a violation or a report being filed against them for flying without official weather.

Turning to charge 8(a): Air East, Inc., initiated or permitted the use of company policy, practices or procedures which continuously prohibited its pilots from logging inoperative or malfunctioning aircraft instruments, engines or equipment in the appropriate space in the aircraft's flight log, that this practice was engaged in by the company, pursuant to—and by the pilots for the company--pursuant to instructions from both Allan McKinney and Tom Reddecliff.

It is apparent from the testimony of Trotter, Dewitt, Underwood, Montague and Fuller, that Allan McKinney

and Reddecliff told, for example, Trotter not to enter no-go items in the pilot rep rts in the aircraft log on the left-hand side of the page as required by the company policy manual.

These items were required by the company to be placed on a white sheet of paper and inserted loose in the log and handed to maintenance at completion of the flight.

The evidence established that this practice existed.

Charge 8(b), under the same heading: that Air East, Inc., issued and initiated, adopted or permitted the use of company policies, practices or procedures which continuously were contrary to Air East, Inc., company manual, and required its flight personnel to report such malfunctions as described in subparagraph (a) above on a separate sheet of paper or orally, to the maintenance personnel.

This charge is established by testimony from Trotter, Shoemaker, Dewitt, Montague, Sayther, Fuller, and Josepho.

Trotter, for example, testified that he was told by Allan McKinney and Tom Reddecliff not to enter discrepancies in the log book but to put them on separate pieces of paper and put it in the back of the log book. This occurred during the early period of his employment. He later was told to take the piece of paper and place it on the desk in the office. These items were on occasion minimum equipment lists in the aircraft flight manual. Specific items were established by the evidence.

For example, Trotter flew with flaps inoperative with paying passengers on VFR flights. He flew aircraft 133AE during the period from June 22 to December 22 with a fuel gage on the pilot's side and the nacelle light inoperative.

On numerous occasions during the winter in IFR conditions where ice conditions existed, he operated the air-

craft with the windshield heater and the defroster inoperative on the Captain's side and detailed the method that was used to clear the windshield of ice, namely, opening the side windows, and scraping the ice off with an ice scraper. At one point the pilots started carrying ice scrapers to correct this deficiency.

Other items are also indicated as being inoperative and remaining over inoperative over an extensive period of time by Trotter. Occasionally, of course, papers would be lost in this process.

According to Montague, Tom Reddecliff admitted this was a possibility and that it would create problems for other pilots. It did, in fact, happen to Montague.

Saythor was told by Tallent to write up mechanical discrepancies on a separate piece of paper and did so constantly.

Josepho operated an aircraft with the auto feather lights inoperative with Captain Saythor. This was a no-go item they determined on looking in the Beechcraft manual.

When Saythor called the operator, the operations office, and was told by Tallent that that was nothing—it was done all the time, they thereupon continued the schedule.

Tom Reddecliff dismisses this testimony of the inoperative auto feather light which he says occurred on January 8, 1974, by saying Saythor did not check it properly, but it actually was all right, and was checked out later by Reddecliff.

Turning to charge 8(c), where Air East, Inc., is alleged to have initiated, adopted or permitted the use of company policies which continued to prohibit its maintenance personnel from entering such flight personnel reported discrepancies in the flight log until such time as required parts or repairs could be accomplished, the evidence supports this.

Agnello testified that when he got an oral report or one on a white separate sheet of paper, this was entered

in the log book on the day the work was done, and not until. He was told by Tom Reddecliff to do this. He testified to the malfunctioning auto feather light and conceded that was inoperative at the time and should not have been flown.

Panarella testified to having received oral or reports written on separate sheets of paper. He would put these discrepancies in the log book when the work was finished but not before. This, of course, could have been sometime after the deficiency occurred.

There was testimony on the inoperative PN 101 in aircraft 133AE. This is a directional indicator device and during the period, according to Panarella, from August or September, 1973, portions of this device were removed and sent for repairs. However, the aircraft still flew.

After a new type altimeter was put in aircraft 135AE, pilots informed him that there was 150-foot difference between them. He, himself, worked on the system quite awhile over a period of one or two weeks before it was corrected. During this time he saw the aircraft leave and return each day and the altimeter was eventually sent back to the factory and changed.

Agnello and Orlowsky also would work on the PN 101.

All of these items were refuted by the respondents by testimony that they were, in fact, hand entered in the log book. The explanation went against the testimony of Panarella and Agnello and was without any weight.

These represent examples of the difficulty of the establishing of charges or developing information by searching records that were kept by Air East. If, as appears obvious, no entries were made in the log books, nobody, during the course of an inspection of those log books, would be able to determine that any particular item was, in fact, not functioning. The white pieces of paper were floating around apparently among the various mechanics and were not available to anyone examining the records.

It is claimed that the PN 101 was in fact repaired, that all logbooks show it was repaired on the day that the entry was made.

Charge 8(d): Air East, Inc., initiated the policies which permitted the practice of, and such practice which continuously permitted, required or caused the falsification of aircraft maintenance records required to be maintained by Air East, Inc.

Although he testified to a specific date he worked on a specific aircraft, Orlowski, testified he signed Tom Reddecliff's name at the bottom of the certification and released it to service. On January 3, 1974 he again signed Tom Reddecliff's name. On January 4, 1974 he again wrote Tom Reddecliff's name. Similarly on December 28, 1973 and December 29, 1973 and on January 2, 1974 he signed Reddecliff's name and indicated his certificate number. He had, in fact, done some work on these aircraft when he signed Reddecliff's name but he had not done all of the work, since some had been accomplished by other mechanics.

Panarella testified that he also signed Tom Reddecliff's name and believed that Reddecliff knew that he signed his name because he took the logs and went through them periodically.

Reddecliff admitted that all the signatures on Exhibits A-72, 73 and 74 were not his, though they were representative of his. He was evasive in his responses to questions on that matter however.

Ronald Zenchak testified that when he was first officer during the period of time from September 9th to December 9, 1973, he was on a flight December 7th to 8th with Capt. Underwood on the mail run. The aircraft experienced difficulty on leaving DuBois. It was observed that there was loss of engine oil pressure on one of the engines and Capt. Underwood shut down the engine. He called Johnstown and talked with a mechanic and later got a return call from

Tom Reddecliff. He thereafter went to the aircraft, swapped the aircraft-gages determined one of the gages was malfunctioning and that the pressure itself was then deemed satisfactory and the schedule was thereafter completed.

Charge 8(e): Air East, Inc., initiated and permitted the use of company policies, practices and procedures which continuously permitted, required or caused the return to service for operations under Part 135, aircraft which had not had required airworthiness inspections and/or maintenance as required by the FARs.

Trotter testified to the same discrepancies on an aircraft he was flying, and again without repairing the item in 135 operation, and specifically referred to a fuel gage that was inoperative.

Orlowski and Panarella testified that they returned the aircraft to service when they were not authorized to do so. The instance of the defective oil gage is a sample of failure to furnish maintenance as required.

Montague flew an aircraft with discrepancies which had not been repaired. Josepho indicated as in Charge 8(b) that the auto feather lights were inoperative.

Charge 8(f): Air East, Inc., initiated, adopted or permitted the use of company policies, practices, and procedures which continuously permitted, required, caused or allowed operation of aircraft under Part 135 when required instruments and/or equipment in such aircraft were inoperable.

The testimony of Trotter in connection with the Charge 8(b) listing the inoperative items supports this allegation. He testified as to the altimeter and air speed indicator on the captain's side of the cockpit as inoperative and that he was told by Tom Reddecliff to go ahead and take it, he would fix it that night. During this period he stated that Allan McKinney was standing staring at him. The infer-

ence he drew may not be what Allan McKinney intended but he believed that he was being told to take it and not question it.

Montague testified as to uncorrected discrepancies in IFR in 135 operations, specifically the flap system, fuel boost pump, fuel indicator, windshield heat, autotherm arming light system, inverter, prop de-icer, landing lights and torque indicator. Also the air speed indicator, turn and bank indicator, correctional gyro and vertical speed.

These were specific items he read, although, of course, he was unable to give specific dates or state specific aircraft upon which they were inoperative. The reason that he did not point to any specific aircraft is apparent, because the item would not have been noted under the practice as testified by the witnesses of not entering it in the logbook until it had been repaired.

Saythe testified that on January 8, 1973 he was captain on a particular aircraft and the autofeather system was not working on the departure from Johnstown. Upon reaching Pittsburgh he called the hangar for a mechanic and reached Tallent, who told him to fly the aircraft.

Saythe asked, "Isn't it illegal under 135 to operate?" And the response of Tallent to him was, "Yes. Operate it." He took the aircraft to Altoona where it was changed, where he changed aircraft.

This was a Beech Aircraft 99, upon which the auto feather system was required equipment and was Part 135 equipment. There was no entry made in the log, but it was written on a separate piece of paper and returned to Johnstown with the other crew.

Saythe also, on cross examination, testified to the inoperative PN 101 Aircraft 133AE in October of 1973. The aircraft had been taken to Teterboro, New Jersey on the 26th of September for repairs and he operated the aircraft after it returned from Teterboro and the PN 101 was still

inoperative for two weeks before it was removed and taken for repair.

Mangold testified to flying with Tallent on June 3, 1973 when the auto feather system was inoperative. He also flew it on subsequent dates and it was still inoperative.

DeWitt testified that on at least one occasion he operated probably out of the artificial horizon direction, an inoperative auto feather system generator under IFR conditions. All of these items were required.

Charge 8(g): Air East, Inc., initiated the policies which permitted the company practices and procedures which continuously permitted, required, caused or allowed the operation of aircraft when such aircraft were not in an airworthy condition.

The lack of airworthiness was established by the failure to maintain the aircraft as indicated above. The testimony by Trotter, to wit, Montague, Fuller. As to these charges it was argued that Section 91.165 does not require pilots to enter mechanical discrepancies in aircraft logbook. Pointing to the absence of any regulatory effect that must be given to such a requirement in Air East policy manual which calls for dismissal of Charge 8(a) (b) and (c).

I must confess I read Section 91.165 differently. After pointing out the requirement of inspection and repairing defects, in addition that section, the last sentence provides: "He shall assure that maintenance personnel make appropriate entries in the aircraft and maintainance records indicating the aircraft has been released for service."

I don't think entries are appropriate if they were not made before the work has been performed and were made by unauthorized personnel.

I neglected to address any comment to respondent's proposed finding and conclusions under his Paragraph 10 relating to Charge 7. I think they are established by the evidence to which I have referred.

Appendix D.

Pertaining to Paragrph 12 of the proposed findings and conclusions, the respondent argues that there was no evidence that any authorized Air East employee—strike that —on Paragraph 12 of the proposed findings submitted by respondent that there is no evidence of any authorization by Air East where employees falsified maintenance records. He points to the testimony of Tom Reddecliff that he had been advised by Mr. Schaeffer that an aircraft could be operated for ten hours before inspection was necessary. That is the one that was operated on January 11, 1974. I don't think I discussed that particular incident. But on that evening Capt. Underwood—correction—Captain McKinney landed the aircraft and was told on the radio not to taxi it to the hangar but to park it on the side and await instructions. Shortly thereafter, according to the evidence by the complainant, Agnello appeared, removed the logbook and made an entry in that logbook indicating that a required inspection had been performed on January 10th. At the time the logbook showed that there were .3 or .4 hours past the inspection due time on the aircraft.

Thomas Reddecliff explains this incident by stating that he had received a call from one Shaffer from the GADO office in Pittsburgh earlier and he then called Schaffer back and Schaffer told him that he had heard that there was an aircraft which was being operated beyond the inspection due time. According to Reddecliff, Schaeffer told him that the aircraft out on the field could finish its flight so long as it didn't exceed ten hours beyond the inspection due time. Reddecliff said this came as a surprise to him because he didn't know this was permissible.

I think it is apparent, according to his testimony, that he knew it was not permissible. The regulations, as well as the Air East Policy Manual, are quite clear on the matter.

Appendix D.

The aircraft at the time was already at Johnstown where appropriate repairs or inspection could have been performed. No explanation is given for holding the aircraft away from the hangar. At least no explanation by Reddecliff.

I can only surmise what the reason was, but that isn't evidence. I can only say that Reddecliff on this occasion is also totally unworthy of belief and the aircraft was operated beyond the regularly scheduled inspection period in violation of the regulations.

Charge 9—

MR. GERAGHTY: Excuse me. You did not make specific findings with respect to Charge 8.

JUDGE WOODLOCK: Right. And I, by reason of the actions described in Paragraph 8 (a) (b) (c) (d) (e) (f) and (g), find that Air East, Inc., repeatedly violated Section 91.9; 91.29(a); 91.165; 135.60(g); 135.143(a) and (b) of the FAR's and Sections 605(a) and 610(a)(1)(4) and (5) of the Act.

Charge 9. Air East, Inc., on numerous occasions, scheduled pilots for duty in excess of the maximum allowable 14 hours in any 24 consecutive hours and/or without the required 10 hours of continuous rest in any 24 hour period, in violation of Section 135.136(b) and (f) of the FAR's and Section 610(a) (5) of the Act on each such occasion.

The respondents argues that this section cited is unconstitutionally vague and unenforceable. I agree. That charge is dismissed.

Charge 10. Air East, Inc., maintained its pilot flight time records in accordance with the maintenance "Time in Service" definition, i.e., wheels off to wheels on, rather than Pilot Flight Time, i.e., block to block. As a result thereof, Air East Inc., failed to keep the flight time records for all of its pilots in sufficient detail to determine compliance with flight time limitations. For each such pilot,

Air East, Inc., violated Section 135.43(a) (4) (vii) of the FARs and Section 610(a)(5) of the Act.

It is undisputed as to the method used by Air East for computing flight time for its pilots. It was computed on a time off to time on basis. This is contrary to the regulations, which require time to be kept for pilots on a block to block basis.

The Manual, before July 1973—I speak of the Air East Policy Manual, appears not to have contained this method of computing flight time for its pilots. It was changed during July, 1973, and approved by an FAA inspector, to permit computing on a time off time on basis. It would seem apparent that violation of the regulation did, in fact, exist, by the use of this method of computation. The issue is, however, should Air East be charged with responsibility for such violations if the method had been approved by an FAA inspector.

I believe it is fairly well established that the government cannot be estopped to deny the authority of any employee to alter its practices. However, I think it should go to the intent in such cases as this.

However, Luther testified, again his honesty is not questioned by either, that he used lift-off and touchdown method of computation of pilot flight time during the entire period of time he was employed by Air East.

This clearly is prior to the date of July 14, 1973.

MR. RUTHERFORD: Your Honor, you said to possibly interrupt you and I think you have the wrong date. I think it is July 14, 1970.

JUDGE WOODLOCK: '70. I stand corrected, if that is it. Do you have any quarrel with that?

MR. GERAGHTY: I am not sure what date—

MR. RUTHERFORD: The date on the bottom of the page.

MR. GERAGHTY: '71, Your Honor.

MR. RUTHERFORD: I knew it was earlier than '73.

MR. GERAGHTY: It was July 14, 1971.

JUDGE WOODLOCK: I stand corrected. July 14, 1971.

Also to be taken into consideration, the incidents involving Wright and Fuller. Wright related how he entered into an argument about keeping of flight time and turned such flight time in according to the regulations and was told to enter what was put in his aircraft log as his flight time.

Fuller stated that B. F. McKinney told him Allegheny Air Lines used the same method.

Luther stated that he used liftoff and touchdown system to compute his pilot time during the entire period he was employed by Air East, which preceded July 14, 1971.

The violation of Section 135.43(a)(4)(vii) of the FAR, Section 605 is established, but clearly, I consider this a technical violation in view of the approval indicated by an FAA inspector who, for some reason, accepted the method which was used after July 14, 1971 by Air East. Such a violation would, of course, not justify the large sanction requested by the Administrator.

Charge 11 is being dismissed.

Charge 12. From April 29, 1973 to date, Air East, Inc. knowingly utilized the services of at least one pilot as pilot-in-command in Part 135 operations when such pilot or pilots had not completed the routes and airports flight check given by the Administrator or an approved check pilot, thereby violating FAR Section 135.122(a), and Section 610 of the Act for each operation.

Respondent argues that since the Pittsburgh FAA District Office files contain documents indicating that all pilots used by Air East had the appropriate crew flight check, and Air East had no knowledge that any pilot was not qualified, this charge too must be dismissed.

The fact that the Pittsburgh office had documents goes to the very essence of the charge, and to the numerous charges contained therein, and that is the falsification by the respondent of information furnished or made available to the FAA, and will carry no weight in a determination of the findings on this charge.

Capt. Luther was check pilot for the company, and remained the only one fully qualified until he was suspended by the General Aviation District Office in January, 1974.

In 1973 Tallent was designated for 135.138 checks but not for 135.131 or 135.122 checks. Luther's check he represented as having given Capt. Wilkinson on October 31, 1973, was not in fact given. This is the only note I have on the check for 135.122(a), which no doubt is my oversight, but that is the only one I have noted. I will withhold a finding on that until I get to Charge 13.

Charge 13. From April 29, 1973 to date, Air East, Inc., knowingly and continuously used the services of at least one pilot in a Beechcraft Model 99 aircraft when he had not passed a flight check in that type aircraft given by the Administrator or an authorized check pilot in that type of aircraft since the beginning of the 12th calendar month before that service. By each such use of a pilot, Air East, Inc. was in violation of Section 135.138(b) of the FARs and Section 610(a)(2) and (5) of the Act.

Merle Luther testified extensively on this. He stated that the statement of competency for Jeff Wilkinson which was dated November 7, 1973 indicating that the method requirements for captain in a Beech 99 signed by Luther, were not in fact given by Luther.

DeWitt testified he hadn't got a check after being used in 135 operations until he obtained one from an FAA inspector on March 16, 1973, and had been used fifty times in 135 operations.

Luther testified he did not give Saythe a check on July

15, 1973, as a first officer, which could be the 135.138 check, or later.

Wright was due for his six months captain check in April of 1973 and so informed Tallent and Allan McKinney. It was nevertheless permitted to expire and although he had not had a check in June, it was backdated to 29 May, which was the legal time for having taken such a check, by Merle Luther, thus approving 135 operations without such a check. He had none until November, 1973 when Tallent and Day, a member of the SWAP team flew with him. His earlier check had been with Luther in November, 1972; 135.131.

Fuller testified that he never received a check ride while he was with Air East, either from the company or from FAA, and was used for 94, 95 days as a crew member. If in the few times he flew with Luther he had a check ride, he was unaware of it.

He related an instance which occurred when an FAA inspector asked him who had given him his company 135.138 check. Allan McKinney who was standing close by, jabbed him in the ribs and indicated that he was to say Luther and not Allan McKinney.

Underwood had not received 135.138 while with the company and had never flown with Luther. He had also had 135.131 with an FAA inspector on July 23, 1973. He was illegal during the time he operated with the company as a co-pilot.

Luther testified that he did not give Knouff a check ride on July 9, 1973 as indicated in the records but did in fact check him on July 18th. This also was 135.138 check.

The respondents, of course, deny that they were party to any such attempts to enter false information and that if Luther had done so, he certainly did it without their knowledge or permission.

He testified that he had never been instructed by officials of respondent to make such entries in so many words, but

he was told by Allan McKinney, after McKinney had ridden with several pilots, to take care of the paperwork. Luther interpreted that as meaning it was not necessary to check the pilot but merely to complete the documentation establishing that they had in fact met the appropriate requirements. Such a conclusion appears inescapable and at the very least it can be said to be default on the part of Allan McKinney as a member of management to make certain what was intended when he told Luther to take care of the paperwork.

Charges 12 and 13 were established by the evidence and violation or regulations cited are found.

Charge 14. From April 30, 1973 to date, Air East, Inc. knowingly and continuously used the services of at least one pilot in command under IFR when he had not passed an instrument check given by the Administrator or an approved check pilot. By each such use of a pilot in command, Air East, Inc. was in violation of Section 135.131(a) and (b) of the FARs and Section 610(a)(5) of the Act.

Wright testified that he never received a six month check and that he flew twelve times thereafter on schedule before receiving a check. The date he was due was May 29th and he testified that he did not in fact receive one until November 19, 1973 during which time he operated. Luther testified that he did not give Wright a check on the 28th of May, 1973 or at any time thereafter.

Luther testified that on November 4, 1973, although the logbook shows he gave Allan McKinney a six month check, he had not, in fact, done so. This was in a Beech 18 Aircraft which he recalled had not been out of the hangar on that day.

As to Wilkinson, he testified that he did not give him a check ride on October 21, 1973. If he had done so, he would either have shown a check in the log or forgotten to enter it in.

Clutter did not receive a check from Luther on April 4, 1973 as indicated but did so on April 14, 1973.

As to Tailent, Luther states that he did not give him a check ride on April 29, 1973, although he conceded the possibility that he might have given him one at some other time. He had a vague recollection that he had done so, but it was not supported by any logbook entry.

This charge is established by the evidence and the regulations cited are found.

Charge 15: Air East, Inc., knowingly falsified, or caused or permitted the falsification of numerous pilot training records to show that flight crew members who had not been trained or tested, were trained or tested and thereby failed to make available the true and correct information. By such action, Air East, Inc. violated Section 135.43(a)(4)(vi)(x) of the FARs with reference to each such record.

While the regulation cited is to Charge 15 it is supported by the evidence submitted under Charges 13 and 14.

Charge 16. Air East, Inc. by reason of its actions as described in Paragraph 12, 13, and 14 failed to provide aircraft and facilities to enable its pilots, who were engaged in IFR and multiengine operations to properly maintain and demonstrate their ability to conduct such operations in violation of Section 135.37 of the FARs.

It is clear that the charges cited support the allegations contained in Charge 16, and violation of 135.37 is established.

Charge 17. Air East, Inc. on at least one occasion failed to mail or deliver to the appropriate representative of the Administrator a summary report, concerning at least one of its multiengine aircraft, reporting the required information relating to propeller feathering in flight, in violation of Section 135.59 of the FARs.

Although there is reference throughout the record to a spare Beechcraft aircraft available at Johnstown, the prac-

tice of the respondent in permitting false entries representing that check rides had been given, which in fact had not been given, clearly indicates that whether an aircraft was or was not available, it was not used.

Luther testified on several occasions that the time when the pilot needed to requalify would suddenly appear and there was no time to permit a check ride before he was scheduled. This, he also indicated, was one reason he signed false statements of competency.

This charge is established and a violation of Section 135.59 of the Regulations is found.

Charge 19. Air East, Inc., through its officials, put into effect and accomplished—

MR. RUTHERFORD: Your Honor, I hate to interrupt but it appears you started on 17 but then you went back and talked about 16 and you never decided 17.

MR. GERAGHTY: Yes, sir, I think I would have to agree with Mr. Rutherford, because what we are talking about is the failure to file a report after the feathering of an engine in flight.

JUDGE WOODLOCK: Did I read Charge 17?

MR. GERAGHTY: I believe so.

JUDGE WOODLOCK: Then I will go back again. Strike what I started to say about 19. Had I started? I made a finding on 15?

MR. GERAGHTY: Yes, sir, 15 and 16, but I believe you misspoke yourself on 17.

JUDGE WOODLOCK: The incident about which much of the evidence relating to Charge 17 was given was that surrounding a flight which occurred on February 20, 1974 when Underwood was pilot on Aircraft 7799 Romeo, and upon observing that the oil pressure was dropping or approaching the red line on one engine, he feathered it.

He returned to Johnstown from DuBois, where the incident occurred, and was advised, according to him, but maintenance to takeoff the aircraft, feather it and take it home with one engine. He went back to Johnstown and changed aircraft. Zenchak was co-pilot on this flight.

Zenchak appeared as a witness, after having been subpoenaed, and stated that he had no idea why he had been called. He had not talked to Underwood for some time and certainly not after receiving a subpoena. His account of the incident coincides with that given by Underwood.

Zenchak said at the time Underwood got a return call from Tom Reddecliff—and I have two incidents—Ron Zenchak is the one that I am interested in, not the one—because we have two Underwoods. But at any rate, he completed the schedule after changing the oil gages and determining that the oil pressure was not the problem but that the oil gage was.

The stories coincide with that of Underwood and Zenchak on this incident, and clearly there was no opportunity for them to arrive at an agreed account for what happened.

Contrary to this account we have that of Thomas Reddecliff, who in explaining his recommendation to Underwood that the oil gages be exchanged to determine whether it was the oil gage or the engine pressure which was not correct stated that he was merely doing preventive maintenance. Further, he said he did not know that the engine had been shut down. So his failure to make the appropriate entries and the report to the Administrator of this incident was not, he says, attributable to the company but rather to someone else. Reddecliff's explanation of preventive maintenance reflects unfavorably on his knowledge of the regulations as well as his knowledge of maintenance and is again unworthy of belief. And the violations as set out in Charge 17 are established.

Returning now to 19. Air East, Inc., through its officials, put into effect and accomplished the company policies,

procedures and practice described herein, by intimidating, coercing or threatening its pilots and maintenance personnel who refused, or were reluctant to comply with such unapproved, illegal, or unsafe policies, practices or procedures.

Shoemaker testified that the night he failed to go by company policies he was threatened with being put back as a first officer. He was harassed and embarrassed. He resigned on April 19, 1973, and when he said he told Tallent, he was called names. His account is that Reddecliff berated him for some 45 minutes in his office behind closed doors, and that at one point shoved him and pushed him across the room. It is easier to believe Shoemaker in his account than it is Reddecliff in his denial, and he is entitled to more credence, in my opinion.

DeWitt was general in his complaints of pressure and harrassment and spoke mainly of criticism by Allan McKinney. The tenor of his testimony, of course, is that the criticism was not deserved, but there is no evidence to support that, or that it was deserved.

The day he left Air East, Tom Reddecliff tried to entice him into a flight.

Saythe testified that Allan McKinney had told him when he was checked out as a captain, that if he "screwed up" he would think nothing of putting him back in the right seat.

Mangold testified that he was criticized when he lost the tickets but he wasn't really critical of Allan McKinney who did make an issue over what he had done because he felt that was management's prerogative

Fuller testified about the dispute he had been in with B. F. McKinney about a letter that he had written to Eastern Air Lines. He was cross examined about that letter but his explanation of the letter, of the contents, is more convincing than the implications in the questions

in cross examination. There is no evidence that anybody in management had seen that letter or knew what was in the letter until Fuller testified as to its contents.

Another bit of interesting evidence relating to this particular charge is that contained in the depositions by Alexander, offered by the respondent. There was reference, and Alexander was asked, as to whether he knew or heard the rumor that B. F. McKinney had put a contract out on him. He stated there had been rumors to that effect but he did not believe them. And he didn't believe B. F. McKinney would say anything like that, although he did recognize that Mr. McKinney was a man of some emotional strength. However, of course, if that sort of rumor were prevalent at Air East among the various pilots and they believed it, it could indeed have an effect on their willingness to resist what they felt were improper practices. There always exist, of course, economic pressures on people in these situations and many of the pilots were married with children. One in particular had a child who is retarded and was certainly concerned with keeping his position, which they all admitted paid better than most other commuter airlines with which they had been familiar.

There is some evidence to support this charge, although there is no allegation of any particular regulation violated. It certainly goes to the attitude of Air East to comply with the regulation and to its insistence that irregularities be accepted without dispute.

Charge 20.

MR. RUTHERFORD: Is there a finding on 19, Your Honor?

JUDGE WOODLOCK: I found that the charge has been established, although I pointed out that there is no regulation which was cited. At least I thought I did. If I didn't, I now do.

And as I said, the pressures and attempt to engage in first fights with the various pilots could or could not have been influential in the pilot's reluctance to resist what they felt was unapproved or unsafe policies, practices or procedures.

Charge 20. By reason of all of the circumstances pertaining to the operation of aircraft as alleged in the foregoing paragraphs, and in addition to the FAR violations and/or violations of the Act specified in such paragraphs, Air East Inc. further repeatedly violated Section 605(a) of the Act.

I don't know what this means: "they further repeatedly violated Section 605(a) of the Act." Violations of Section 605(a) of the Act were alleged in many instances and I don't know how they could have further violated what I have found they already did in fact violate.

If this is comprises other acts in addition to those previously alleged of course it is an improper charge, because they haven't set out any further violations.

I am going to dismiss that charge.

Now coming to the ultimate conclusions on this lengthy complaint. It is found that by the violations and practices, policies and procedures found, as stated above, Air East, specifically management of Air East, Inc. demonstrated that they do not possess the judgment, responsibility or disposition to comply required of a holder of an Air Taxi Operators' Certificates and are no longer qualified to hold such certificate.

By reason of all the foregoing facts and circumstances, it is found that safety in air commerce or air transportation and the public interest require the revocation of Air East Certificate No. 14-EA-69, and the Administrator's order is hereby affirmed.

I turn now to the emergency order of revocation which serves as the complaint herein directed to James Avery Tallent.

Charge 1. You are the holder of Airline Transport Pilot Certificate No. 1757672, issued October 18, 1973, with airplane single and multi-engine land ratings and commercial privileges with AC 1121 and CJ 1123 type ratings. This is admitted by respondent.

Paragraph 2. Charge 2. From on or about July 15, 1972 to date you served as Operation Officer (Chief Pilot) for Air East, Inc. d/b/a Allegheny Commuter. In addition, from about October 30, 1970, to date you served as a Captain and pilot-in-command in the operation of Air East, Inc. aircraft under Part 135 of the Federal Aviation Regulations (hereinafter referred to as the FARs).

This is also admitted.

Paragraph 3. It is found, as charged, that in his position as chief pilot for Air East, Inc., it was his responsibility to supervise all pilots of said company, and supervise and assure completion of all initial and recurrent training and testing of all company pilots; assure that all pilots understood and complied with all company practices, policies and procedures; determine that all pilots in command operate their flights in compliance with applicable sections of the Federal Aviation Act of 1958, as amended (hereinafter referred to as the Act) and the FARs; schedule all pilots; recommend to the Vice President of Flight Operations the necessity for changes of directives or policies regarding aircrews and air craft equipment.

Charge 4. While serving as a Captain and pilot-in-command for Air East, Inc. in the operation of aircraft carrying passengers and/or cargo under Part 135 of the FARs and/or while serving as pilot-in-command on operations under Part 91 of the FARs.

And thereunder, subparagraph (a): On numerous occasions while operating such aircraft under IFR, you used instrument approach procedures at Johnstown-Cam-

bria and Martinsburg, Blair County (Altoona), Pennsylvania Airports which had not been approved by the FAA in FAR Part 97. On each such occasion your operation was in violation of Sections 91.116(a) and 91.9 of the FARs and Section 610(a) (5) of the Act.

The testimony in support of this charge was elicited from Capt. Trotter, who described the illegal 33 approach at Johnstown, as in Charge 5 of the Air East complaint, and also stated that he had gone through that procedure with Capt. Tallent under instrument conditions.

Trotter also testified as to the use of instrument procedures unpublished at Altoona and that Tallent showed him an unauthorized procedure at Altoona. And Trotter was with him when he used it in IFR conditions with paying passengers.

Montague testified to performing illegal approaches with Tallent. Frank Marzick, who was furloughed on March 15, 1974 from Air East, testified that during the period he was with Air East, that is from January 21, 1974 to March 15, 1974, he was first officer with Tallent on an IFR approach to Johnstown in a Part 135 operation. In fact, he testified that Tallent made an instrument approach of that nature about every day he flew with him.

At Altoona, on February 4th, he and Tallent went through a back course approach, and to check this he had the published approach plate out and it was not the same procedure that Tallent was following.

He also testified that on February 14, 1974 Tallent used a new approach at Johnstown and went below minimums descent altitude.

Frank Marzick testified that he used unauthorized approaches at Altoona and to Johnstown with Tallent, as do DeWitt and Fuller.

That charge is supported by the preponderance of the evidence, and it is found that James Avery Tallent vio-

lated Sections 91.116(a); 91.9 of the FARs and Section 610(a) (5) of the Act.

Under Charge 4, Subparagraph (b). On numerous occasions while operating such aircraft under IFR, you used altitude and/or visibility minimums at Johnstown-Cambria and Martinsburg, Blair County (Altoona), Pennsylvania Airports which were below those prescribed in the FAA approved instrument approach procedures as described in FAR 97. On each such occasion your operation was in violation of Sections 91.116(a) and (b); 91.117(a) and (b); and 91.9 of the FARs and Section 610 (a) (5) of the Act.

Testimony supporting this charge was elicited from Trotter, DeWitt, Montague and Sayther. That testimony was also given in support of Air East Charges 5 and 6.

The charge is established and violation of the cited regulations is found.

Under Paragraph 4, Subparagraph (c). On more than one occasion while operating such aircraft under IFR, you deviated from an ATC clearance that had been accepted and acknowledged without obtaining an amended clearance in violation of Sections 91.75(a) and 91.9 of the FARs and Section 610(a) (5) of the Act.

Trotter testified that he was with Tallent when we went to the so-called Alpha Altitude without amended clearance with paying passengers on numerous occasions.

Montague testified that when he was first officer flying with Tallent during the period from April 2nd to June 11, 1972 he also observed Tallent deviating from ATC clearance without an amended clearance.

Fuller also did it, as did Howell.

Tallent testified that he never did such a thing because it was too easy to get his clearance changed. If it was in fact easy to get a clearance changed, then, of course, this aggravates the seriousness of the complaint, because there

would be less reason for deviating without obtaining an amendment.

All of these witnesses, with the exception, of course, of Tallent, testified to the use of the term "Alpha Altitude." Tallent professed to have never heard of the term before the hearing. Practically every witness had heard the term and many of the witnesses, of course, had not had any communication with each other prior to the hearing and denied that they discussed their testimony during the course of the hearing.

Paragraph 4(c) is established by the preponderance of the evidence and it is found that the regulations as cited have been violated as charged.

MR. GERAGHTY: Your Honor, would that also include the violation of the Act in Paragraphs (b) and (c), the regulations, when you said "violations as charged"?

JUDGE WOODLOCK: The Act said "any violations of regulations." Violations of the Act, doesn't it?

MR. GERAGHTY: Yes, sir.

JUDGE WOODLOCK: I will make such a finding if you feel it is necessary, and I do so.

Under Paragraph 4, Subparagraph (d). On more than one occasion, you operated an aircraft under VFR when you did maintain that minimum distance from clouds as prescribed in, and in violation of, Sections 91.105(a) and 91.9 of the FARs and Section 610(a)(5) of the Act.

That Tallent did this on occasion was testified to by Trotter, who stated that Tallent would cancel an IFR clearance where traffic was between him and the field and bust through clouds on VFR.

Montague testified that he was with Tallent when he failed to maintain the minimum distance from clouds required by the regulations.

The charge is established and violations of the Sections cited of both the Regulations and the Act are found.

Subparagraph (e) under Paragraph 4. On more than one occasion, you operated an aircraft which was not in an airworthy condition and you failed to discontinue such flight, or flights, when unairworthy mechanical conditions existed, in violation of Sections 91.29(a) and (b) of the FARs and Section 610(a) (5) of the Act.

That Tallent violated regulations and the Act as cited is supported from testimony by Trotter, Mangold, Montague and Sayther, although Montague was far from specific as to the times this occurred when he was with Tallent.

The charge is found substantiated by the evidence and the Regulations and Act cited are found to have been violated.

Subparagraph (f) under Paragraph 4. On numerous occasions, you operated aircraft, when such aircraft either exceeded the maximum certificated takeoff weight and/or were outside the approved center of gravity limits. On each such occasion your operation was in violation of Sections 91.31(a) and 91.9 of the FARs and Section 610(a) (4) and (5) of the Act.

Witnesses supporting this charge were DeWitt, Montague and Sayther.

Montague specifically testified that he would inform Tallent when the aircraft was three to four hundred pounds over gross.

To the argument that standard weights be used and children's weights were not take into consideration, it can only be responded there is a provision in the Act where the actual weight, or the regulations, correction, providing a procedure to be followed when specific weights are required.

That charge is substantiated by the evidence and the violations alleged of the regulations are in fact so found.

Subparagraph (g) under Paragraph 4 is dismissed.

Although I note the proposed findings in this case does

not argue that the regulation is impossible of understanding, I find it to be so in any event, and I dismiss the charge.

Subparagraph (h) under Paragraph 4. From April 30, 1973 to October 18, 1973, you knowingly and continuously served as pilot-in-command under IFR when you have not passed an instrument check given by the Administrator or an approved check pilot. On each such occasion you operated in violation of Sections 135.131(a) and (b) of the FARs and Section 610(a) (5) of the Act.

The evidence of Luther establishes that the respondent herein had not received the required 135.131 instrument check ride as required.

The charge is therefore sustained as is the violation of the Section cited in both the Regulations and the Act.

The Order of the Administrator herein entered is affirmed.

Turning to the Charles Allan McKinney Complaint, Charge 1. 1 and 2 are admitted. They follow:

Charge 1. You are the holder of Commercial Pilot Certificate No. 1698830, with airplane single and multiengine land, Aero Commander 1121, Lear Jet 23/24 Type Ratings and instrument ratings originally issued November 21, 1969.

Charge 2. From about September, 1972 to date you served as Vice-President of Flight Operations for Air East, Inc. d/b/a Allegheny Commuter. In addition, from about August 4, 1969 to date you served as a Captain and pilot-in-command in the operation of Air East, Inc. aircraft under Part 135 of the Federal Aviation Regulations (hereinafter referred to as the FARs).

Charge 3, which was denied, relates to the duties of the respondent here as Vice-President of Flight Operations at Air East, and it is found that as Vice-President it was his duty to supervise flight operations of the company; to maintain flight training and pilot records and assure

that flight personnel complied with the regulations and the Act.

Charge 4. While serving as a Captain and pilot-in-command for Air East, Inc. in the operation of aircraft carrying passengers and/or cargo under Part 135 of the FARs and/or while serving as pilot-in-command on operations under Part 91 of the FARs:

Subparagraph (a). On numerous occasions, while operating such air craft under IFR, you used instrument approach procedures at Johnstown-Cambria and Martinsburg, Blair County (Altoona), Pa. Airports which had not been approved by the FAA in FAR Part 97, in violation of Section 91.116(a) and 91.9 of the FARs and Section 610(a) (5) of the Act.

Trotter described an approach into Johnstown using Runway 33 at a time when there was no published approach for that runway.

Shoemaker describes going into Johnstown below minimums, which, of course, appears in the next charge, but from time to time the Complaint has said this also constitutes an unapproved instrument approach procedure, and it does, but nothing appears to be added to the charges by citing it under a separate paragraph.

Shoemaker testified that he went into Altoona with Allan McKinney using a different than published approach under IFR conditions.

DeWitt himself testified as to his landing at Johnstown with Allan McKinney on what he first said was February 20, 1973 but which more probably was February 21, 1973, and used 33 approach, which was unauthorized.

Montague testified, as indicated in Air East Charges 5 and 6, to McKinney's use of unauthorized procedures.

Charge 4(a) is supported by the evidence and the regulations cited and the Sections of the Act cited are found to have been violated.

Appendix D.

Subparagraph (b) under Paragraph 4. On numerous occasions, while operating such aircraft under IFR, you used altitude and/or visibility minimums at Johnstown-Cambria and Martinsburg, Blair County (Altoona), Pa. Airports which were below those prescribed in the FAA approved instrument approach procedures as described in FAR 97. On each such occasion your operation was in violation of Sections 91.116(a) and (b); 91.117(a) and (b) and 91.9 of the FARs and Section 610(a) (5) of the Act.

Such operations were described by Trotter, who according to his testimony was on board the aircraft with Allan McKinney on October 23, 1970 when an approach was made under zero-zero conditions. As Trotter recalls the event he was seated behind McKinney and was in fear of his life. To make more frightening the event, they were low on fuel. After landing in what Trotter described as zero-zero conditions, they ran out of gas on one engine, after which it took some ten minutes to taxi to the hangar.

This, of course, has been denied by McKinney. And again it is a matter of credibility between two individuals who were there. And, of course, McKinney's testimony was supported by the members of the management roster who were in the aircraft at the same time and deny that the affair was such as described by Trotter.

Again it is suggested that the pilots were not sufficiently familiar with the runway environment to determine whether they were or were not below minimum descent altitude and that in any event if they were first officers, they would have had their heads in the cockpit and could not have made the contact that the captain was making with the ground.

Trotter, in this instance, certainly did not have his head in the cockpit, because he was a passenger, although seemingly unwillingly.

Shoemaker testified that he also went through this Johnstown minimum approach with Allan McKinney, and also into Altoona when they went below published minimums.

Appendix D.

DeWitt also, on the occasion described on February 20, 1973, and one other time during that same week.

G. Knouff sustains the charges, as does Fuller and Montague.

Montague describes another frightening experience on June 21, 1972 when he first went on the mail run with Allan McKinney and they descended to zero-zero. This was during extremely heavy rain at Harrisburg. Since he is not charged here with going in Harrisburg below minimums, that incident will be stricken.

The charge, however, is established and it is found that the regulations cited under Paragraph 4(b) were in fact violated, as was the Section of the Act.

Subparagraph (c) under Paragraph 4: On more than one occasion while operating such aircraft under IFR, you deviated from an ATC clearance that had been accepted and acknowledged, without obtaining an amended clearance, in violation of Sections 91.75(a) and 91.9 of the FARs and Section 610(a)(5) of the Act.

Respondent here, of course, testified that he too had never heard of the term Alpha Altitude before these proceedings, and also adhered to ATC clearances given to him.

Disputing that testimony is that of Trotter, Shoemaker, Montague, Fuller and Howell. I find their testimony more credible than that of the respondent and the charge is established and the violations alleged are found supported by the evidence.

Subparagraph (d) under Paragraph 4. On more than one occasion, you operated an aircraft under VFR when you did not maintain that minimum distance from clouds as prescribed in, and in violation of, Sections 91.105(a) and 91.9 of the FARs and Section 610(a) (5) of the Act.

Testimony was elicited on the charge from Shoemaker, and Fuller, both holders of ATRs, more properly Transport

Pilot Certificate, which it must be again noted Allan McKinney was not.

The charge is sustained and the violations as alleged are established.

Subparagraph (e) under Paragraph 4. On more than one occasion, you operated an aircraft which was not in airworthy condition and you failed to discontinue such flight, or flights when unairworthy mechanical conditions existed, in violation of Section 91.29(a) and (b) of the FARS and Section 610(a) (5) of the Act.

Testimony given by Knouff, DeWitt, and Josepho support this charge, and violations alleged are found to have been committed.

Subparagraph (f) under paragraph 4. You operated aircraft on numerous occasions when such aircraft exceeded the maximum certificated taken off weight or was outside the approved center of gravity limits. On each such occasion your operation was in violation of Section 91.31(a) and 91.9 of the FARs and Section 610(a) (4) and (5) of the Act.

Testimony relating to the respondent's operation and charge was obtained from Wright, Trotter, DeWitt, Montague, Mangold, and Howell. Testimony was in essence as set out under Charge 2 under the Air East complaint and Charge 3 under the Air East complaint.

The testimony goes to the practices by these various pilots on the air mail run with the respondent relating to the filling out of the load manifest in the air after take off. Violations charged are established.

Subparagraph (h) under paragraph 4. Between April 29, 1973 and the present time you knowingly and continuously served as a pilot in Beechcraft model 99 aircraft when you had not passed a flight check in that type of aircraft given to you by the Administrator or an authorized check pilot in that type of aircraft since the

beginning of the 12th calendar month before that service. By serving as pilot on each such flight you violated Section 135.138(b) and Section 610(a) (2) and (5) of the Act. The fact that the respondent had a current letter of proficiency of course is one of the difficulties which the Administrator was confronted with in his efforts to establish the charges.

Testimony was obtained from Luther, the authorized check pilot, who said he had not in fact given McKinney his check ride on April 29, 1973. Allan McKinney stated that he did but his name is not shown in the records as having been checked, other than on the statement of competency. And in testimony he said that he had received the check between 7:45 and 9:30 p.m. The log for the aircraft in which he claimed to have received the check, 133AE, shows that McKinney was on a charter trip, off at 1445 and on 2220. Luther flew from 0815 to 1532.

The records as they so frequently do not, do not support Allan McKinney's testimony and the charges are established.

Subparagraph (i) under paragraph 4. From April 29, 1973 to date you knowingly and continuously served as pilot in command of a flight under IFR when you had not passed routes and airports flight check given by the Administrator or by an approved check pilot. On each such occasion you were in violation of Section 135.122(a) and Section 610(a) (5) of the Act.

There was some question about this particular charge. It appears that McKinney's competency qualifications expired on 30th of September 1973. He was shown as having taken the check on November 4, 1973. He did perform Part 135 flights under IFR conditions on the 1st, 2nd, and 3rd of November, one or all of those dates and defended by saying the 4 November check related back to the 1st of November. I do not believe so.

The charge is sustained.

Subparagraph (j) under paragraph 4. From April 30, 1973, to date, you knowingly and continuously served as pilot in command under IFR when you had not passed an instrument check given by the Administrator or an approved check pilot. On each such occasion you operated in violation of Section 135.131(a) and (b) of the FARs and Section 610(a) (5) of the Act.

Luther testified that he did not in fact give Allan McKinney a six month check on November 4, 1973. So the answers he elicited from Fahey, a Federal Aviation employee, are academic, accepting Luther's explanation of his failure. As he recalls the incident—and I am speaking here of Luther—the aircraft in which McKinney purportedly received his check ride was not removed from the hangar on the date represented.

The charge is established as are the violations.

It is ordered that the Order of the Administrator be affirmed.

Turning now to the Jeffrey H. Wilkinson complaint. It is admitted that the respondent herein is the holder of commercial pilot certificate No. 1929748 and that from September 1971 to date, that is March 7, 1974, he served as captain and pilot in command for Air East, Inc. d/b/a Allegheny Commuter, and that during a portion of said period he served as training officer and was responsible for the ground training of Air East pilots.

Charge 3. While serving as a captain and pilot in command for Air East, Inc., in the operation of aircraft carrying passengers and/or cargo under Part 135 of the Federal Aviation Regulations, hereinafter referred to as the FARs, and /or while serving as pilot in command in operations under Part 91 of the FARs.

Subparagraph (a): On numerous occasions while operating such aircraft under IFR, you used instrument ap-

proach procedures at Johnstown-Cambria and Martinsburg, Blair County, Altoona, Pennsylvania Airports which had not been approved by the FAA in FAR Part 97. On each such occasion, your operation was in violation of Sections 91.116(a) and 91.9 of the FARs and Section 610(a) (5) of the Federal Aviation Act of 1958, as amended (hereinafter referred to as the Act).

Testimony supporting this charge was elicited from Fuller, Howell, and Dunn. In the face of this testimony Wilkinson's denial that he had ever performed these maneuvers or operations is not accepted as credible. The charge is found established.

Subparagraph (b) under Paragraph 3. On numerous occasions while operating such aircraft under IFR, you used altitude and/or visibility minimums at Johnstown-Cambria and Martinsburg, Blair County, Altoona, Pennsylvania Airports which were below those prescribed in the FAA approved instrument approach procedures as described in FAR 97. On each such occasion, your operation was in violation of Section 91.116(a) and (b), 91.117(a) and (b); and 91.9 of FARs and Section 610(a) (5) of the Act.

Testimony supporting this charge was elicited from Fuller, Wright, and Howell and sustains this charge in the face of respondent's denial.

Subparagraph (c) under Charge 3. On more than one occasion while operating such aircraft under IFR, you deviated from an ATC clearance that had been accepted and acknowledged without obtaining an amended clearance in violation of Section 91.75(a) and 91.9 of the FARs and Section 610(a) (5) of the Act.

This respondent also denies ever having heard the term "Alpha" altitude before these proceedings in the face of testimony from every witness who testified on these matters that the term "Alpha" altitude was one used by the company so that passengers on board or other people lis-

tening to the conversation would not know that pilots were in fact deviating from clearances obtained from air traffic control.

Fuller testified on this charge as did Howell. The charge is sustained.

Subparagraph (d) of Charge 3. On more than one occasion you operated an aircraft under VFR when you did not maintain that minimum distance from clouds as prescribed in, and in violation of, Section 91.105(a) and 91.9 of the FARs Section 610(a) (5) of the Act.

Fuller's testimony supports this charge and he recalled going into Pittsburgh on February of 1973 on VFR flight plan when Wilkinson went through clouds. Wilkinson's explanation, if I have it related properly, was the Fuller was not aware that he was on an IFR clearance. In any event, Wilkinson denies it, Fuller supports it. Fuller's testimony is more credible than Wilkinson's in light of other evidence and the particular denial that such matters as company altitude and company minimums and Alpha altitudes were never used or heard of before the proceedings by the respondent.

The charge is established.

Subparagraph (e) under paragraph 3. On numerous occasions you operated aircraft when such aircraft either exceeded the maximum certificated takeoff weight and/or were outside the approved center of gravity limits. On each occasion your operation was in violation of Sections 91.31(a) and 91.9 of the FARs and Section 610(a) (4) and (5) of the Act.

Testimony by Fuller and Howell supports the charge. It is found to be established.

Charge under subparagraph (f) of paragraph 3 is dismissed.

Subparagraph (g) under paragraph 3. Between April 29, 1973, and the present time, you continuously and

knowingly served as pilot on Beechcraft model 99 aircraft when you had not passed a flight check in that type aircraft, given to you by the Administrator or an authorized check pilot in that type of aircraft since the beginning of the 12th calendar month before that service. By serving as a pilot on each such flight you violated Section 135. 138(b) of the FARs and Section 610(a) (2)and (5) of the Act.

Luther's testimony supports the charge. He stated that he was not in the aircraft alleged to have been used by Wilkinson on October 31, 1973 and denies having given a check ride to Wilkinson at all.

The charge is sustained.

Subparagraph (h) of paragraph 3. From April 29, 1973, to date, you continuously and knowingly served as pilot in command of flights under IFR when you had not passed a routes and airports flight check given by an approved check pilot or by the Administrator. On each such occasion you were in violation of Section 135.122(a) of the FARs and Section 610(a) (5) of the Act.

The charge is supported by the evidence and it is so found.

Subparagraph (i), Paragraph 3. From April 30, 1973, to date, you continuously and knowingly served as pilot in command under IFR when you had not passed an instrument check given by the Administrator or an approved check pilot. On each such occasion, you operated in violation of Sections 135.131(a) and (b) of the FARs and Section 610(a) (5) of the Act.

The evidence supports this charge and it is so found.

The order of the Administrator is affirmed.

JUDGE WOODLOCK: As to the order relating to Air East, Inc., the Repair Station.

It is admitted that Air East, Inc. was as of March 7, 1974, and at all times mentioned in the complaint the Holder

of a Repair Station Certificate number 114-2 issued on August 21, 1970, pursuant to Part 145 of the Federal Aviation Regulations, hereinafter referred to as the FARs. That is charge 1 and that was admitted.

Charge 2 was denied. Charge 2 reads:

Air East, Inc. in performing maintenance or alterations, on aircraft, under authority of its Repair Station Certificate on several occasions approved such aircraft for return to service without having performed such required work in such a manner and using materials of such quality, that the condition of such aircraft was equal to its original or properly altered condition. By each such action, Air East, Inc., violated Section 43.13(a) and (b), 43.15(a) and 145.57(a) of the FAR's.

The incident that comes most easily to mind under this charge is that testified to by Agnello and the occasion on January 11, 1974 when at Thomas Reddecliffe's instructions he went out, signed the log showing a routine inspection done on January 10, which was not in fact done until after he had signed the log on January 11. The absence of the routine inspection required the grounding of the aircraft and it is obvious that aircraft was returned to service without having such work performed let alone having been performed in such manner that the condition was equal to its original or properly altered condition.

In view of the testimony relating to aircraft 57A80, the Beach 18, is confusing at best. Agnello denied making an inspection on May 7, in May of that year, where his name appears in another logbook as having performed the inspection on September 10, 1972. The airframe inspection had been performed on December 21, 1971 according to the records from the prior owner of the aircraft.

The charge is established, however, because, at the very least, of Agnello's testimony.

Charge 3. Air East, Inc., in exercising the authority and privileges of its Repair Station Certificate, on numerous occasions, required, permitted, or caused aircraft, airframes, engines, instruments, or accessories which Air East, Inc., had maintained or altered, to be approved for return to service without such articles having been inspected and determined to be airworthy by a qualified inspector. This was accomplished by the performance of inspections by non-qualified personnel and the subsequent making of fraudulent or intentionally false entries and certifications in the aircraft records. By reason of such actions Air East, Inc. on each such occasion repeated violated Sections 145.59(a), 43.5 and 43.11(a) of the FARs.

Panarella and Orlowski having signed Reddecliff's name to documents releasing certain aircraft to service certainly supports this charge.

Reddecliff's dual role with the Repair Station and Company would appear to make both the repair station and the company responsible for his actions or non-action.

The charge is established.

Charge 4. On numerous occasions Air East, Inc. when performing work and inspections under authority of its repair station certificate failed to maintain proper and adequate records, naming the person who supervised and/or inspected that work, in that the records maintained by Air East, Inc. failed to name the person actually supervising and/or inspecting that work and then fraudulently and/or intentionally falsified the record to show that such supervision and/or inspection had been performed by an authorized and qualified person. By each such action, Air East, Inc. violated Section 145.61 of the FARs.

This, of course, is supported by the testimony of Orlowski to the effect that he had never been appoinnted or designated to release aircraft for service. Reddecliff had testified that he had designated Orlowski during the period Agnello was discharged and subsequently rehired.

Tom Reddecliff testified that those whose alternate signature appeared in the manual were authorized to release

aircraft to service. Orlowski's name was never indicated in the manual as authorized to do so.

Reference was made during the course of the testimony particularly by the respondents, and at some points during cross examination, to the provision appearing on page 50 of the Air East manual which seems at first glance to authorize mechanics to return aircraft to service. I do not read the provision that way and read it only as meaning that the mechanic can certify as to the airworthiness of the work done by him. I think the meaning is clear and in light of Reddecliff's testimony that only Agnello was authorized except during the period of his unemployment when Orlowski was authorized that argument is not convincing.

Panarella also signed Tom Reddecliff's name releasing aircraft to service and no explanation for that practice was offered except that there must have been a misunderstanding or the manual authorized it. Reddecliff's failure to keep himself advised of such practice reflects adversely on both his operation and that of the repair station.

I find the charge established.

Charge 5. By reason of the circumstances alleged in the foregoing paragraphs, and in addition to the FAR violations specified therein, Air East, Inc., repeatedly violated Section 605(a) of the Federal Aviation Act of 1958, as amended in that it failed, when inspecting, maintaining, or overhauling aircraft equipment under authority of its repair station certificate, to observe and comply with the requirements of the Act and the FARs. By such actions, Air East, Inc., further violated Section 610(a) (7) of the Federal Aviation Act of 1958, as amended.

I am going to dismiss that charge. It just does not make any sense. It says that the Company failed to comply with the requirements of the Act and FARs by violating the Act and FARs and it just—I'll dismiss it.

However, I find that the emergency order of revocation should be and it is hereby affirmed.

We turn now to the complaint against Thomas Reddecliff.

It was admitted that the respondent Reddecliff was the holder of mechanic certificate number 1596574 and that he was directly in charge of the maintenance functions of the Air East, Inc. Repair Station from August 21, 1970 to date and that he was required to hold and did in fact hold the mechanic certificate referred to above.

Charge 3. In such position it was your duty and responsibility to supervise all maintenance and inspection for determining the airworthiness and for the return to service of each aircraft, airframe, engine, instrument, or accessory on which the Air East, Inc. repair station performed such maintenance and inspection.

Although paragraph 3 was denied it is clear in the testimony and by reference to the policy manual of the company that it does set out accurately the duties and responsibilities of the respondent.

Paragraph 4. On numerous occasions, when serving in such capacity:

Subparagraph (a) you performed, and/or supervised the performance of, work on aircraft in such a manner and/or used or permitted the use of materials of such quality that the condition of such aircraft worked on was not at least equal to its original or properly altered condition, and you permitted such aircraft to be returned to service in such condition. By reason of your actions you violated Section 43.13(a) and (b) of the FARs and Sections 605(a) and 610(a) (2) of the Federal Aviation Act of 1958, as amended, on each such occasion.

Testimony relating to the PN101 and aircraft 147AE indicates that at various times, a portion of the instrument were removed and sent for repair. During the period, however, the aircraft was continued to be operated when

maintenance had not been performed in accordance with the regulations.

There was testimony relating to a horizon gyro. And I check myself here because the PN101 was not in 147AE, it was in 133AE, as I recall. But the horizon gyro in 147AE is shown according to Reddecliff, the respondent, to have been precessing but on the 12th he said the directional gyro was replaced. Then the log says according to Reddecliff on January 14 and 15 the captain's horizon gyro was erratic and the same date shows the repair.

This again reflects the problems surrounding these repairs when the instruments or items are not shown in the logbook as having been inoperative on the date when they actually were first inoperative but which appeared subsequently when repaired to have been entered in the logbook or at least contemporaneously with their repair and the log reflects that that was the practice.

The incident involving Underwood and Zenchak and the inoperative oil gauge also goes to support the charges in this paragraph and they are found to have been established.

Subparagraph (b) under paragraph 4. You knowingly, authorized, permitted or caused aircraft on which Air East, Inc., Repair Station had performed maintenance or alterations to be inspected, certified as airworthy and returned to service by persons who were not authorized and qualified to perform such functions. In this connection you instructed or allowed unqualified persons to perform such inspections and to return such aircraft to service by fraudulently or intentionally forging your signature, or that of another qualified inspector, in the aircraft records. By reason of your actions on each such occasion you violated Section 43.5(a) of the FARs and Sections 605(a) and 610(a)(2) of the Federal Aviation Act of 1958, as amended.

The allegations set out herein are supported by testimony from Orlowski and Panarella. Whether or not it was

Orlowski or Panarella who stated that he was informed by Reddecliff to sign his name when he was either absent or not or too busy it is considered more worthy of belief than the testimony of Reddecliff that he made no such statement or made no such authorization.

The order of the Administrator is hereby affirmed.

That, I think, disposes of all of the charges which I find need to be disposed of other than by dismissal. But I would like to say that in referring to aircraft operated throughout my findings I am referring to either Beechcraft 99 or Beechcraft 99A except where I have specifically referred to Beechcraft 18.

Also in making my findings I want it clear that I find the charges which I have found to be established to be established by a preponderance of the credible evidence.

Are there any corrections at this point?

(None noted.)

Any other matters that I have omitted? I take your silence as meaning none.

The parties are advised and I don't know that it is necessary to advise counsel for the respondents of his right to appeal. A notice of appeal must be filed within two days after this date by filing with the Board and serving upon the other parties a notice of appeal. Within five days after filing of the notice of appeal the appellant shall file a brief with the Board and serve a copy upon the other party. Within five days after service of appeal brief a reply brief may be filed with the Board and a copy served upon the other party. The briefs shall comply with the requirements of Section 521.35 (b) (c) (d) (e) (f) and (g) covering contents, waiver of objections on appeal, reply brief, other briefs, number of copies and oral argument.

Your attention is called to the fact that time in emergency procedures is computed in accordance with Section 421.7 and these are all reference to the rules of practice issued by the National Transportation Safety Board including the

provision that Saturdays, Sundays, and legal holidays of the Board shall always be counted in computation.

Is there anything else that remains?

Mr. Rutherford?

Mr. Rutherford: Nothing.

JUDGE WOODLOCK: Mr. Geraghty?

MR. GERAGHTY: No, Your Honor.

JUDGE WOODLOCK: I thank you.

(The hearing was thereupon concluded at 3:15 o'clock p.m., Friday, April 26, 1974.)

APPENDIX E.

Deposition of Thomas Reddecliffe.

FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D. C.

In the Matter Of:

The Investigation of Air East, Inc., Holder of Air Taxi Commercial Operator Certificate No. 14-EA-69, to determine its compliance and the compliance of its personnel with applicable portions of the Federal Aviation Act of 1958, as amended, and the Federal Aviation Regulations.

Conference Room 102
Holiday Inn
Johnstown, Pennsylvania

3:39 P.M.
Thursday,
February 14, 1974

Deposition of THOMAS REDDECLIFFE, called as a witness herein by JOHN E. MARSH, Hearing Officer, pursuant to an Order of Investigation, and having first been duly sworn by the said Hearing Officer, commencing at 3:39 P.M. on Thursday, February 14, 1974, and the proceeding being taken down by Stenomask by WILLIAM H. DILLINGHAM III, Reporter for the Federal Aviation Administration herein, and thereafter transcribed by him.

Appendix E.

APPEARANCES:

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For Thomas Reddecliffe personally, and for Air East, Inc.:

RICHARD J. GREEN, JR., Esq.
201 Cambria Savings Building
Johnstown, Pennsylvania

PROCEEDINGS

Mr. Marsh: This deposition is for the purpose of receiving information from Mr. Tom Reddecliffe, pursuant to an Order of Investigation dated January 18, 1974, issued by John J. Keyser, Assistant Chief Counsel, FAA, in the

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matter of the investigation of Air East, Inc., holder of Air Taxi Commercial Operator Certificate Number 14-EA-69, to determine its compliance and the compliance of its personnel with applicable portions of the Federal Aviation Act and the Federal Aviation Regulations.

I am John E. Marsh, Chief of Policy and Evaluation Branch, Office of the Chief Counsel, FAA, Washington, D.C. I have been delegated the authority to conduct this investigation.

Mr. Patrick G. Geraghty, Chief of Special Projects and Appellate Branch, Office of the Chief Counsel, FAA, Washington, D. C., and Mr. Bernard A. Geier, Chief of the General Aviation Operations Branch, Flight Standards Service, FAA, Washington, D. C., have been designated to assist me in the investigation and in the taking of this deposition.

Now, Mr. Reddecliffe, for the record, would you give us your full name and address?

The Witness: Thomas Reddecliffe, 710 Diamond Boulevard, Johnstown, Pennsylvania.

Mr. Marsh: And Mr. Green, would you identify yourself, please?

Mr. Green: Richard J. Green, Junior, Attorney at Law, 201 Cambria Savings Building, Johnstown, Pennsylvania, representing Mr. Reddecliffe personally, and Air East, Inc. as a corporation.

Whereupon,

THOMAS REDDECLIFFE was called as a witness and, having first been duly sworn by the Hearing Officer, was examined and testified as follows:

Mr. Marsh: Now, Tom, your appearance here is in response to a subpoena which has been issued to you; is that correct?

The Witness: Yes.

By Mr. Marsh:

Q. And you understand that you have not now been granted immunity from any enforcement action or other possible action by the Government, and that any statements you use here can possibly be used against you, and you know that you do have a right to Counsel, and you have Counsel represenitng you.

You also have a right to refuse to answer any questions on grounds that your answer might tend to incriminate you.

Do you understand that? A. Yes.

Q. Now, we want to inform you also at this time that your assistance and cooperation in bringing to the attention of the FAA any possible unsafe or illegal operations, practices or procedures involving Air East, Inc., will be taken into consideration in the event that you have been personally involved in any violations of the FAR's—the Federal Aviation Regulations.

Do you understand that? A. Yes.

Q. Now, Tom, during your employment—well, first, let me ask you, what is your position with Air East? A. Director of Maintenance.

Q. During your employment at Air East, both in your present capacity and any prior capacity that you have been employed in, have you known of any company procedures, practices, instructions or so forth, involving the operation or maintenance of its aircraft, which in your opinion, could jeopardize aviation safety or which could be in violation of the Federal Aviation Regulations, or not in accordance with procedures acceptable to the FAA or approved by the FAA? A. No, not to my knowledge.

By Mr. Geraghty:

Q. Mr. Reddecliffe, can you tell me if you hold any airman's certificates? A. Yes, I do. Pilot's license.

Q. Can you tell me what kind it is, sir? A. Private.

Q. Is that airplane, single-engine? A. Yes.

Q. And do you have any mechanic's certificates? A. Yes.

Q. What kind, sir? A. A&E.

Q. And do you happen to have the certificate number? A. 1596574.

Q. How long have you been employed with Air East? Your best estimate, sir? A. Six years.

Q. You gave a title as Director of Maintenance. Are you the Chief of the Maintenance Department? A. Yes.

Q. I take it any other mechanic working for Air East would be under your supervision and/or control in your capacity as Director or Chief of Maintenance? A. Yes.

Q. And may I ask you if you are aware of where the aircraft logbooks for the Beech AT-99 are? A. Yes, with the airplane.

Q. Where is that? A. It is now having permanent spar modification done to it.

Q. Where is that? A. In Reading.

Q. And when is that due back, sir? A. It's due back very shortly.

Q. Sometime today? A. Yes, sir; back today, tomorrow—whenever it is done.

By Mr. Marsh:

Q. You don't know for a fact that it will be back today? A. No, I do not know for sure.

Mr. Allen McKinney indicated to me that he thought it would be back today and that he was going to send the logbooks over as soon as it came back.

By Mr. Geier:

Q. Mr. Reddecliffe, what was your aviation experience prior to coming with Air East? A. Well, I worked for

United Aircraft as a mechanic on jet engines. I was an Inspection for Hartford Airmotive; I worked for Bradley Air Service, Greater Cambria Aviation as Director of Maintenance, and then Air East.

Q. Then Air East. And what experience have you had on the Beech 99? Have you had any prior to coming with Air East? A. No.

Q. Have you gone to any of the training schools with Beech Aircraft? A. Yes. I have gone to the Airframe-Engine school.

By Mr. Geraghty:

Q. Can you tell me about when that was? A. I have the certificates, but—

By Mr. Geier:

Q. Oh, approximately. A. About four years ago.

Q. I see. And the same way with the Beechcraft at the factory? A. Right.

Q. And did you attend any of the technical meetings? A. Yes, I do. I was the Secretary of the Committee for about a year and a half.

By Mr. Geraghty:

Q. How often are those meetings held? A. Those meetings are held every three months.

Q. Are they held at any particular place? A. They are held throughout the United States. They are not in one area; the last one was in Texas and the one before that was in Texas, again, but in a different part.

Q. Do you go to all those meetings? A. With the exception of the last one; that was right after the accident.

Q. May I ask you also, in your position as Director of

Maintenance, for maintenance of the aircraft, do you also give instructions, do you have meetings, or individually, with the new employees, the flight personnel, as to the use and maintenance of the aircraft from the pilots' point of view? A. The pilots—I talk to them on occasion, or you know, they'll walk up and ask questions and I'll take the time to answer them. Yes. But as far as me giving them a school or not, I do have a Training Officer who does that.

Q. That would be through the Training Officer, who I think is Mr. Wilkinson? A. Right.

Q. You are not, then, responsible for passing instructions directly to—I'd say, most people employed as First Officers, new First Officer employees, as to the Beech 99? A. No. Like I say, I don't directly do this, but if they walk up and ask a question and I can help them, sure I will.

Q. Are you ever called to the ground school classes by Mr. Wilkinson to, say, give a lecture? A. Yes, I am.

Q. In that capacity, then, you would be imparting information as part of the ground school to the pilots whenever they have those training classes? A. On occasion.

Q. I take it they run those whenever they have personnel who need to go through the ground school? A. Yes.

Q. Now, in those ground school classes, is it a normal part of the ground school to give the new employees, especially if he hasn't had any prior 99 time, some basic information as to the mechanical nature of the system of the Beech 99? A. Right.

Q. And would you be the one who would go through that with them? A. Well, it would depend. Jeff Wilkinson is the primary instructor. He has gone through these training sessions himself and he does do the training.

When they run into a particular problem, or maybe somebody doesn't understand it, if they think I could shed a little more light on it, then I would help, but

Q. It's not a normal course of practice? A. No.

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By Mr. Marsh:

Q. Mr. Reddecliffe, how many mechanics does Air East employ right now? A. I believe right now there are four besides myself.

Q. And how many of them are new employees? A. Right now they are all new employees.

Q. What's the general time with the company? A. Well, the—gee, you're asking—

Q. I mean, have they been employed within the last few weeks or the last couple of months? A. Within the last couple of months.

Q. All four of them that are there now? A. Well, no. One person has been with me now for—he stepped up from one job into the Maintenance Department. He's not a licensed mechanic; he's a novice mechanic.

Q. So the other three, then, are licensed mechanics? A. Yes.

Q. Now, who else other than yourself has authority to certify aircraft for return to service? A. Right now, no one.

Q. Just yourself? A. Yes.

Q. How long has that been the situation? A. Not too terribly long. I had some other people who were delegated by myself, which I can delegate authority to return the plane to service.

He left me, oh, I think it was in January.

Q. Who was that? A. Mr. Agnello.

Mr. Geier: I have nothing.

Mr. Geraghty: I have nothing further.

Do you have anything else you would like to bring to our attention, or that you feel you would like to discuss with us at this time?

The Witness: No.

Mr. Marsh: All right. Thank you very much.

(Whereupon, at 3:53 P.M., the taking of the instant deposition was concluded.)

Supreme Court, U. S.
FILED
AUG 25 1975
MICHAEL RODAK, JR., CLERK

No. 75-12

In the Supreme Court of the United States

OCTOBER TERM, 1975

AIR EAST, INC., d/b/a ALLEGHENY COMMUTER, ET AL.,
PETITIONERS

v.

NATIONAL TRANSPORTATION SAFETY BOARD AND JAMES E. DOW, ACTING ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the National Transportation Safety Board (Pet. App. A19–A66) and its administrative law judge (Pet. App. A67–A134) are not reported. The opinion of the court of appeals (Pet. App. A4–A18) is reported at 512 F. 2d 1227.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1975. A timely petition for a rehearing was denied on April 7, 1975. The petition for a writ of

certiorari was filed on July 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the emergency summary revocation of petitioners' aviation licenses denied them due process of law, when a full administrative hearing was held promptly after the revocation.

2. Whether the procedures used by the Federal Aviation Administration and National Transportation Safety Board in reviewing the emergency revocation of petitioners' licenses in this case complied with the requirements of due process.

STATUTES INVOLVED

Section 609 of the Federal Aviation Act of 1958, 72 Stat. 779, as amended, 49 U.S.C. 1429, is set forth at Pet. App. A1–A2.

Section 1005(a), 72 Stat. 794, 49 U.S.C. 1485(a), is set forth at Pet. App. A2–A3.

Section 1006(a), 72 Stat. 795, 49 U.S.C. 1486(a), provides:

> Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

STATEMENT

Until March 7, 1974, petitioner Air East operated a commuter airline furnishing passenger and mail service to various cities in Pennsylvania. It was certified by the Federal Aviation Administration ("F.A.A.") as a commercial air taxi service and aviation repair station. The individual petitioners were four senior Air East officials, who held F.A.A. certificates as pilots or, in the case of petitioner Reddecliff, as a mechanic (Pet. App. A5).

On January 6, 1974, an Air East plane crashed while attempting to land at Johnstown, Pennsylvania, killing twelve passengers and crew members (*ibid*). The National Transportation Safety Board (the "Board") then began an investigation pursuant to Section 701 of the Federal Aviation Act, 72 Stat. 781, 49 U.S.C. 1441, to determine the cause of the accident. In the course of this inquiry, the Board received information concerning Air East's general safety practices. This information was transmitted to the Federal Aviation Administration, which then instituted a separate investigation pursuant to 49 U.S.C. 1429 to determine whether some action should be taken in regard to the aviation certificates held by Air East and the individual petitioners. During its seven-week investigation, the F.A.A. examined company maintenance and pilot records and deposed numerous present

and former Air East employees, including the four individual petitioners and the president of Air East (Pet. A6; C.A. App. I, 245).[1]

Based upon information developed during the course of this investigation, on March 7, 1974, the F.A.A. issued emergency orders revoking all of petitioners' aviation certificates. The revocation orders set forth the grounds for the action and concluded in each instance that an emergency existed and that safety in air commerce or air transportation and the public interest required the immediate effectiveness of the orders (Pet. App. A6; C.A. App. I, 5, 10–11, 15, 20, 23, 26). Cf. 49 U.S.C. 1485(a).

As authorized by 49 U.S.C. 1429, petitioners immediately appealed the revocation orders to the Board, and on March 21, 1974, a hearing was begun before an administrative law judge. Following twenty-five days of testimony and argument, the law judge sustained all of the revocation orders (Pet. App. A67–A134). The Board affirmed the revocations and the law judge's findings except as to one charge against petitioner Tallent (Pet. App. A19–A66).

In sustaining the revocation of Air East's air taxi certificate, the Board found that Air East as a matter of company policy on numerous occasions had, *inter alia*: (1) exceeded maximum aircraft takeoff weights and center-of-gravity limitations; (2) falsified load manifests as to takeoff weights and centers of gravity; (3) used unapproved instrument landing approaches at two airports; (4) violated minimum altitude and

[1] "C.A. App." refers to the appendix filed in the court of appeals, a copy of which has been filed in this Court.

visibility regulations at those airports; (5) operated flights at Johnstown airport without obtaining required weather data; (6) adopted improper procedures for reporting equipment malfunctions; (7) falsified aircraft maintenance records; (8) operated aircraft on commercial flights in an unairworthy condition;[2] (9) utilized pilots who had not passed required flight checks; (10) falsified pilot training records; and (11) coerced or intimidated its pilots and mechanics to comply with these illegal, unapproved, or unsafe procedures (Pet. App. A20–A31, A60–A65). Petitioners McKinney, Tallent, and Wilkinson were found to have engaged in the following practices, *inter alia,* on numerous occasions while acting as pilot-in-command of Air East flights: (1) operated aircraft which exceeded weight and center-of-gravity limitations; (2) used unapproved instrument landing approach procedures at two airports; (3) violated minimum altitude and visibility regulations at those airports; (4) deviated from air traffic control clearances without permission; (5) failed to maintain minimum required distances from clouds (Pet. App. A33–A38, A57–A60). With respect to Air East's repair station and petitioner Reddecliff, Air East's chief mechanic,

[2] Former Air East pilots testified that they had operated planes, with commercial passengers on board, with one or more of the following required items of equipment inoperative: flaps, fuel boost pump, fuel guage, altimeter, air speed indicator, landing lights, and windshield defroster (C.A. App. VIII, 1040–1042; IX, 1342–1350; X, 1790–1791). Some Air East pilots habitually carried plastic ice scrapers so that while the plane was airborne with passengers, they could open a side window and scrape the ice off the windshield so they could see the runway when landing (C.A. App. IX, 1342–1344).

the Board found numerous instances in which (1) aircraft had been returned to service without required work having been performed in a proper manner; (2) aircraft or aircraft parts had been returned to service without an inspection for airworthiness by a qualified inspector; (3) maintenance records had been falsified (Pet. App. A38–A43, A54–A57). The Board concluded (Pet. App. A65):

> [W]hat emerges from the record is the profile of a company which, through its management, initiated and fostered practices that are in violation of numerous provisions of the FAR [Federal Aviation Regulations] and that have compromised safety in every phase of the company's operational and maintenance functions. Air East has thereby demonstrated that it does not possess the care, judgment, and responsibility required of the holder of an air taxi/commercial operator certificate and that revocation thereof is warranted.

The Board also rejected petitioners' numerous procedural arguments (Pet. App. A45–A54, A65–A66).

Petitioners then petitioned the United States Court of Appeals for the Third Circuit for review pursuant to 49 U.SS.C. 1429 and 1486. That court unanimously affirmed the Board's order, holding that the Board's findings were supported by substantial evidence and that none of petitioners' procedural rights was violated (Pet. App. A4–A18).[3]

[3] Pursuant to Section 602(b), 72 Stat. 776, 49 U.S.C. 1422(b), petitioner Reddecliff requalified for a mechanic's certificate one year after revocation of his prior certificate, and the Administrator issued a new certificate to him on July 25, 1975.

ARGUMENT

The decision of the court of appeals is correct, particularly in light of petitioners' flagrant safety violations found by the Board. The decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. a. Petitioners' primary contention is that the Due Process Clause prevents the Administrator of the F.A.A. from summarily revoking their aviation certificates, thereby halting Air East's operations, upon finding the safety violations described above (Pet. 7–20). Petitioners argue that they should have been allowed to continue their operations pending completion of an administrative hearing. But, as the opinion of the court of appeals demonstrates, the procedure followed in this case is expressly authorized by the Federal Aviation Act and is constitutionally valid.

Air carriers such as Air East hold their aviation certificates subject to the duty "to perform their services with the highest possible degree of safety in the public interest." Section 601(b), 72 Stat. 775, 49 U.S.C. 1421(b). The procedure for imposing suspensions or revocations of these certificates is set forth in 49 U.S.C. 1429, 1485(a), and 1486 (see Pet. App. A1–A3; p. 2, *supra*). The holder of the certificate is entitled to prior notice of the charges and an opportunity to reply except when, as here, the Administrator finds "an emergency requiring immediate action exists in respect of safety in air commerce." 49 U.S.C. 1485(a). Any person adversely affected by the Administrator's order may appeal to

the Board, an independent agency. The filing of an appeal stays the effectiveness of the order unless, as here, "the Administrator advises the * * * Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the * * * Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator." 49 U.S.C. 1429.[4]

The Board decides appeals *de novo,* and the Administrator has the burden of proving his complaint. 14 C.F.R. 421.24. The Board's regulations provide for a full evidentiary hearing before an impartial administrative law judge (14 C.F.R. 421.22–421.33), whose decision is appealable to the Board itself (14 C.F.R. 421.34 to 421.37). The Board's decision is, in turn, reviewable by a court of appeals. 49 U.S.C. 1429, 1486.

Thus, although the Administrator's initial orders in this case were called emergency "revocations," in effect, because petitioners filed administrative appeals, the initial orders merely suspended their certificates for a maximum of sixty days from the date the Administrator advised the Board of the emergency. Within that period, the Board was required to issue a

[4] There is no merit to petitioners' argument (Pet. 17–18) that the Administrator must personally certify the emergency. This argument is based upon 14 C.F.R. 13.19(d), which provides that "the Administrator's order is stayed unless *he* advises the board that an emergency exists" (emphasis added). Pursuant to 14 C.F.R. 1.1, however, "Administrator" includes the Administrator's delegate. In the present case, the certificate was properly executed by the Administrator's chief counsel for appellate proceedings (see C.A. App. I, 38).

final order that would supersede the Administrator's initial orders.

This emergency revocation procedure does not deny due process of law. "[I]t has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *Goldberg* v. *Kelly,* 397 U.S. 254, 263, n. 10, quoting from *R. A. Holman and Co.* v. *Securities and Exchange Commission,* 299 F. 2d 127, 131 (C.A.D.C.), certiorari denied, 370 U.S. 911. Thus, a prior hearing is not required for seizure and destruction of food unfit for human consumption (*North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306); summary seizure of property to collect taxes (*Phillips* v. *Commissioner,* 283 U.S. 589); transfer of bank assets to a conservator (*Fahey* v. *Mallonee,* 332 U.S. 245); seizure of mislabeled drugs (*Ewing* v. *Mytinger and Casselberry, Inc.,* 339 U.S. 594); revocation of a security clearance necessary for particular employment (*Cafeteria Workers* v. *McElroy,* 367 U.S. 886); or discharge of government employees (*Arnett* v. *Kennedy,* 416 U.S. 134). A commercial airline engaged in the unsafe practices recited in the revocation orders endangers human life and thus presents a threat far more serious than that at issue in most of the above cases where summary procedures were upheld.[5] Moreover, the emer-

[5] The standards for imposing summary actions in these cases were comparable to the standard of 49 U.S.C. 1485(a): "an emergency requiring immediate action * * * in respect of safety in air commerce." Thus, there is no merit to petitioners' contention (Pet. 15–17) that the standard at issue here is unduly

gency revocations were imposed only after a thorough investigation in which the accusations of "grave wrongdoing * * * were supported by statements of apparently knowledgeable individuals" (Pet. App. A12).

Petitioners' reliance upon such cases as *Fuentes* v. *Shevin,* 407 U.S. 67, and *Bell* v. *Burson,* 402 U.S. 535, is misplaced because those cases did not involve summary action by a public official taken to protect human life. Similarly, in the recent school suspension case, *Goss* v. *Lopez,* 419 U.S. 565, 582–583, this Court stated:

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vague, particularly as applied to Air East's flagrant safety abuses.

Petitioners misleadingly assert that Air East's January 6, 1974, accident "was not shown to be related to * * * any of the violations alleged in the complaint" (Pet. 15). The Board issued its report on the probable cause of the accident while this case was pending on appeal, and a copy of the Board's summary was furnished to the court below. The Board failed to determine the exact cause of the accident but described it as probably the result of a "deliberate descent below the published minimum descent altitude" combined with other factors. NTSB Aircraft Accident Report No. NTSB–AAR–75–3, dated January 15, 1975, p. ii. The Board also found that the aircraft that crashed had taken off with two items of equipment inoperative, that its load manifest was falsified as to takeoff weight, that it was outside allowable center-of-gravity limits when it crashed, and that its pilot's and copilot's check flight records had been falsified (Report, *supra,* at 2–6), although these violations were not found to have been causally related to the crash. We are lodging a copy of the Accident Report with the Clerk.

Petitioners also rely upon two System Worthiness Analysis Program reports on Air East which the F.A.A. completed before the crash (Pet. 14), but they do not cite the Board's finding that "the failure of these inspections to uncover the violations established herein is in large measure attributable to the record falsifications designed to assure that such violations would not be detected" (Pet. App. A65).

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable * * *.

A fortiori, summary action was constitutionally appropriate here.

b. Prior to the court of appeals' decision in the present case, two district courts had held the emergency revocation procedure invalid. But see *Aircrane, Inc.* v. *Butterfield,* 369 F. Supp. 598 (E.D. Pa.). In the first of these, *United States* v. *Harper,* 335 F. Supp. 904 (D. Mass.), vacated as moot, 406 U.S. 940, the court misapprehended the nature of the revocation order because it stated that an emergency *suspension* of a certificate without any hearing would have been valid. As discussed above, the holder of a certificate can, in effect, convert the emergency "revocation" into a suspension merely by contesting it. The other decision, *Priority Air Dispatch, Inc.* v. *Brinegar,* Civil No. 1573–73, D.D.C., decided August 15, 1973, preliminarily enjoined enforcement of an emergency revocation order on the ground that prior notice and hearing were required. In so holding, however, the court did not cite or discuss any of this Court's precedents discussed above, which are inconsistent with its holding. A later Board order in *Priority Air* was subsequently reviewed by the Court of Appeals for the District of Columbia Circuit, which expressly noted that the correctness of the district court's preliminary injunction was not at issue. *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board,*

514 F. 2d 1335, 1336; but see *id.* at 1342 (Danaher, J., concurring and dissenting). Thus, there is no conflict among the courts of appeals, and the opinion below, which is the only well-considered decision regarding the constitutionality of the emergency revocation procedure, is fully in accord with this Court's recent decisions.

2. Petitioners also raise numerous other procedural contentions. These arguments, too, were correctly rejected by the court of appeals and the Board and do not warrant further review.

a. First, petitioners contend that the administrative complaints were inadequate because they failed to allege specific dates and other details (Pet. 21–23). There is no constitutional or regulatory requirement that the complaints contain such detailed allegations. See *Cella* v. *United States,* 208 F. 2d 783 (C.A. 7), certiorari denied, 347 U.S. 1016. Moreover, as the court below noted (Pet. App. A13–A15), wherever possible, such specific dates, names, places, aircraft numbers, and other details were provided by the Administrator in the bills of particulars (C.A. App. I, 77–243) and through comprehensive discovery.[6]

[6] Petitioners are wrong in asserting that the bills of particulars were "deceptions" (Pet. 22, n. 11) because the law judge's findings were unspecific. The "unusually well-detailed" (Pet. App. A15, n. 15) opinion of the law judge contains many specifications of precise dates and other identifying details (*e.g.*, Pet. App. A72, A75, A82, A83, A85, A90–A91, A93–A94, A96–A98). Moreover, pursuant to the Board's interlocutory decision (C.A. App. II, 383–385), the law judge excluded evidence, except as offers of proof, which pertained to violations that were not specified in the bills of particulars (Pet. App. A45; see *e.g.*, Pet. App. A71, A121).

b. Petitioners also assert that charges relating to offenses that occurred more than six months before the revocation orders should have been dismissed as stale under 14 C.F.R. 421.25 (Pet. 23–25). The six-month limitation is expressly inapplicable to charges alleging lack of qualification of the certificate holder, and the complaints against all petitioners made that allegation (C.A. I, 5, 10, 15, 20, 23, 26, 38). As the Board held in properly construing its own regulations, "[l]ack of qualification can be established by regulatory violations sufficiently serious in nature to demonstrate a lack of the degree of care, judgment, and responsibility required of a certificate holder" (Pet. App. A49, n. 92). See *Nadiak* v. *Civil Aeronautics Board,* 305 F. 2d 588 (C.A. 5), certiorari denied, 372 U.S. 913.

c. Petitioners next argue that charges relating to Air East's intimidation of pilots and use of unapproved landing approaches should have been dismissed because such conduct did not violate any statute or regulation (Pet. 25–26). With respect to Air East's intimidation of its pilots, the Board acknowledged that no regulation had been violated, but properly concluded that such action was relevant to the "insistence of Air East management that the pilots accept irregular practices without dispute" (Pet. App. A65). These other irregular practices were found to have violated specific regulations. Thus, it was correct for the Board to consider its finding of intimidation—the accuracy of which Air East does not here challenge—in relation to Air East's responsibility for the regulatory violations by its pilots specified in the other

charges against Air East. Petitioners also err in contending (Pet. 26) that use of an "unapproved" approach does not violate 14 C.F.R. 91.116(a). Unless otherwise authorized, that provision requires use of "standard" instrument approaches, *i.e.*, those which the Administrator has "adopted." 14 C.F.R. 97.10 (see Pet. App. A57, n. 105).

d. Equally without merit is petitioners' claim that all charges should have been dismissed because the Administrator sent the Board's chairman a letter, which petitioners contend contained "prejudicial and defamatory remarks" (Pet. 26). The letter informed the chairman that the Administrator had received complaints, which he was investigating, by former Air East pilots that Air East was retaliating against them for their testimony in the Board's proceeding (C.A. App. I, 253–254). The president of Air East responded by affidavit to the substance of these complaints (C.A. App. I, 252). Both the court below and the Board concluded that this letter did not provide any basis for dismissing the charges against petitioners, and this finding is plainly correct (Pet. App. A15, n. 15; A49).[7]

e. Although petitioners also contend that the administrative law judge's decision failed to make adequate findings and conclusions (Pet. 27–30), the court of appeals properly characterized that decision as "com-

[7] The chairman did disqualify himself on the basis of this letter, but in so doing he stated that the letter did not affect his impartiality although it might present "a scintilla of doubt in the minds of some * * *" (C.A. App. II, 381). The chairman had not disclosed the letter to the other Board members nor discussed it with them (C.A. App. I, 265–266).

prehensive and unusually well-detailed" (Pet. App. A15, n. 15), and the Board correctly held that the decision satisfies the requirements of the applicable regulation, 14 C.F.R. 421.32(b) (Pet. App. A51). The decision, which was delivered orally, contains specific findings on each charge (see Pet. App. A67–A134).[8] Moreover, by failing to object to the adequacy of the findings before the law judge (see Pet. App. A133–A134), petitioners are precluded from challenging them now.

f. Petitioners also contend that both the Board and the court below applied erroneous legal tests in evaluating the conflicting evidence (Pet. 30–35). Essentially, however, this contention is merely that the law judge should have accepted petitioners' self-serving denials of the charges against them instead of accepting the testimony of the Administrator's numerous witnesses, who included seventeen former Air East pilots and four former Air East mechanics. The court below properly declined to overturn the Board's findings as to the credibility of the witnesses and correctly con-

[8] Petitioners also argue that the law judge supported three findings by citing testimony of witnesses, who, in fact, did not support those findings (Pet. 29). In each instance, however, the law judge also relied upon the testimony of other witnesses whom petitioners do not attempt to discount (Pet. App. A117, A119, A124–A125). Moreover petitioners' claim is factually incorrect because the testimony of Montague (C.A. App. IX, 1339–1341) and Sayther (C.A. App. XI, 1945, 1968–1970 (offer of proof)) does support a finding that Tallent flew unairworthy aircraft (Charge 4(e)); Montague also testified (C.A. App. IX, 1332–1333) as to McKinney's use of unauthorized landing approaches (Charge 4(a)); and Howell testified (C.A. App. XIV, 2897–2904) as to Wilkinson's use of unauthorized landing approaches (Charge 3(a)).

cluded that the voluminous record contains more than the necessary substantial evidence to sustain the Board's revocation orders (Pet. App. A15).[9]

g. Petitioners also complain that they lacked adequate time to prepare their administrative appeal and that the Board should have granted oral argument (Pet. 36–37). As the court below noted, however, the stringent time limits governing Board appeals are for the benefit of persons, such as petitioners, who seek immediate review of a revocation order (Pet. App. A10, n. 8). The Board informed petitioners that they could waive the expedited procedures (C.A. App. I, 33), but they chose not to do so. Similarly, the board normally does not hold oral argument in expedited appeals (see 14 C.F.R. 425.25; Pet. App. A45). But full oral arguments were presented to the Board's administrative law judge (C.A. App. XVI, 3807–3843) and transcripts of these were available to the Board. Nor has the Board ignored petitioners' arguments. The Board's decision refutes point-by-point the arguments raised in petitioners' written brief. In these circumstances, oral argument before the Board was not constitutionally required. See *Federal Communications Commission* v. *WJR*, 337 U.S. 265.

[9] Petitioners' argument (Pet. 35) that Air East was not responsible for the admitted falsification of pilot check-flight records by its employee ignores the Board's findings that the employee understood from petitioner McKinney that he was expected to falsify the records in order to keep the pilots flying and that McKinney, who was Air East's vice-president, was aware of the falsifications (Pet. App. A63; see also Pet. App. A103–A107).

h. Petitioners also assert that many of the regulations they were held to have violated are either unconstitutionally vague or inapplicable to this case (Pet. 37–38).[10] The vagueness claim is unmeritorious, particularly because no criminal sanctions or First Amendment rights are at issue. Cf. *Parker* v. *Levy*, 417 U.S. 733. In addition, the Board's decision (Pet. App. A20–A43) carefully relates each charge to the regulations it held applicable, and its holdings in this regard are correct.

i. Finally, petitioners contend that revocation of their certificates was not an authorized sanction (Pet. 38–39). That sanction is expressly authorized by 49 U.S.C. 1429, however, and has long been imposed when the regulatory violations are sufficiently serious to demonstrate that the certificate holder lacks requisite care, judgment, and responsibility (see Pet. App. A49, n. 92). *E.g.*, *Nadiak* v. *Civil Aeronautics Board, supra.* Revocation was appropriate here, where petitioners were found to "have compromised safety in every phase of [Air East's] operational and maintenance functions" (Pet. App. A65).

[10] For example, petitioners assert 14 C.F.R. 91.9 is unduly vague. That regulation provides: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1975.

U.S. GOVERNMENT PRINTING OFFICE 1975